Non-Mandates Cases Cited

California State Restaurant Assn. v. Whitlow
(1976) 58 Cal.App.3d 340

Estate of Griswold
(2001) 25 Cal.4th 904

Evangelatos v. Superior Court
(1988) 44 Cal.3d 1188

Ferdig v. State Personnel Bd.
(1969) 71 Cal.2d 96

Western Sec. Bank, N.A. v. Superior Court
(1997) 15 Cal.4th 232

Whitcomb Hotel v. California Employment Commission
(1944) 24 Cal.2d 753

CALIFORNIA STATE RESTAURANT ASSOCIATION, Plaintiff and Respondent,
v.
EVELYN E. WHITLOW, as Chief, etc., Defendant and Appellant
Civ. No. 38010.

Court of Appeal, First District, Division 4, California.

May 17, 1976.

SUMMARY

The trial court ordered issuance of a writ of mandate restraining the Chief of the Division of Industrial Welfare, State Department of Industrial Relations, from enforcing a policy of prohibiting an employer from taking a credit against the minimum wage of a restaurant employee for the dollar value of meals furnished, without the specific written consent of the employee. The court held that a minimum wage order promulgated by the Industrial Welfare Commission, then in effect, authorized employers in the restaurant industry to take a credit for meals furnished or reasonably made available to employees without such consent, that the announced policy would constitute an amendment to the order, and that it was therefore beyond the scope of defendant's authority. (Superior Court of the City and County of San Francisco, No. 680041, Ira A. Brown, Jr., Judge.)

The Court of Appeal reversed with directions to the trial court to deny the writ. While the court agreed with the trial court that the wage order permitted an employer to take credit for meals against the minimum wage without the employee's consent, it further held that the order was void as in conflict with the provision of Lab. Code § 450, that no employer shall compel or coerce any employee to patronize his employer, or any other person, in the purchase of anything of value. The court held there was no perceptible practical difference between an "in kind" payment of wages and a "compelled purchase." (Opinion by Caldecott, P. J., with Rattigan and Christian, JJ., concurring.) ***341**

HEADNOTES

Classified to California Digest of Official Reports

(1) Administrative Law § 35--Administrative Actions--Construction and Interpretation of Rules and Regulations.
Generally, the same rules of construction and interpretation which apply to statutes govern the interpretation of rules and regulations of administrative agencies.

(2) Administrative Law § 35--Administrative Actions--Construction and Interpretation of Rules and Regulations.
In construing a statute or an administrative regulation, a court should ascertain the intent of the promulgating body so as to effectuate the intended purpose of the statute or regulation.

(3a, 3b) Labor § 10--Minimum Wage Orders.
A provision of a minimum wage order promulgated by the Industrial Welfare Commission permitting restaurant employers to take a credit for the value of meals furnished employees against the minimum wage otherwise payable, was correctly construed by the trial court as allowing the employer to take the credit without the consent of the employee, where every wage order relating to the restaurant industry during a period of over 20 years had referred to meals furnished by the employer as a part of the minimum wage, and no policy statements during that period made any reference to any requirement of employee consent, where during that period, and for many years prior thereto, it had been the open and recognized practice of restaurant employers to take a meal credit against the minimum wage without employee consent, and where the commission had considered and rejected a proposal that the wage order in question expressly require employee consent.

(4) Statutes § 44--Contemporaneous Administrative Construction.
Contemporaneous administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is clearly erroneous or unauthorized.

(5) Statutes § 44--Contemporaneous Administrative Construction--Reenactment of Statute With Established Administrative Construction.
Reenactment of a provision which has a meaning ***342** well-established by administrative construction is persuasive evidence that the intent of the enacting authority was to continue the same construction previously applied.

(6a, 6b) Labor § 10--Minimum Wage Orders--In

Kind Payment of Wages as Compelled Purchase.
A provision of a minimum wage order promulgated by the Industrial Welfare Commission permitting restaurant employers to take a credit for the value of meals furnished employees against the minimum wage otherwise payable, construed as permitting the employer to take the credit without the consent of the employee, violates Lab. Code, § 450, which prohibits compelling or coercing an employee "to patronize his employer, or any other person, in the purchase of anything of value." There is no perceptible practical difference between an "in kind" payment of wages and a "compelled purchase," and any implied power the commission might have under Lab. Code, § § 1182, 1184, to authorize in kind payments must be limited, in harmony with § 450, to situations in which such manner of payment is authorized by specific and prior voluntary employee consent.

[See **Cal.Jur.2d,** Labor, § 24; **Am.Jur.2d,** Labor and Labor Relations, § 1789.]

(7) Administrative Law § 30--Administrative Actions--Effect and Validity of Rules and Regulations--Necessity for Compliance With Enabling Statute.
Administrative bodies and officers have only such powers as have expressly or impliedly been conferred on them by the Constitution or by statute. In the absence of valid statutory or constitutional authority, an administrative agency may not, under the guise of regulation, substitute its judgment for that of the Legislature, and administrative regulations in conflict with applicable statutes are null and void.

(8) Statutes § 28--Construction--Ordinary Language.
In order that legislative intent be given effect, a statute should be construed with due regard for the ordinary meaning of the language used and in harmony with the whole system of law of which it is a part.

(9) Statutes § 27--Construction--Liberality--Remedial Statutes.
A remedial statute must be liberally construed so as to effectuate its object and purpose, and to suppress the mischief at which it is directed. ***343**

COUNSEL

Evelle J. Younger, Attorney General, and Gordon Zane, Deputy Attorney General, for Defendant and Appellant.

Hawkins, Cooper, Pecherer & Ludvigson, Daryl R. Hawkins, M. Armon Cooper and Nathan Lane III for Plaintiff and Respondent.

CALDECOTT, P. J.

The issue presented on this appeal is whether Labor Code section 450 prohibits an employer in the restaurant industry from requiring a minimum wage employee to take meals as part of his compensation and have the value of the meals deducted from the minimum wage without the written consent of the employee. We conclude that such action is prohibited.

On August 26, 1974, appellant Evelyn Whitlow, [FN1] as Chief of the Division of Industrial Welfare, Department of Industrial Relations for the State of California, announced her intention to institute a "new policy" regarding certain provisions of the then current minimum wage order of the Industrial Welfare Commission.

> FN1 The writ of mandate issued by the trial court was directed to Whitlow, who is hereinafter described as "appellant" although the agency itself is also a named party and appellant.

Section 4 of Minimum Wage Order No. 1-74 allowed employers in the restaurant industry to take a credit for the value of meals furnished employees against the minimum wage otherwise payable. The "new policy" set forth in a document entitled "Meal Policy for Restaurants Only," inter alia, prohibited a credit against the minimum wage for the dollar value of meals furnished without the *specific written consent of the employee*. It further provided that such consent could be revoked at the beginning of each month. This new policy was based on appellant's determination that the current construction of section 4 of Order No. 1-74 was in violation of section 450 of the Labor Code.

Respondent California State Restaurant Association filed a petition for a writ of mandate to in effect restrain the appellant from putting the "new policy" into operation. The trial court entered judgment granting a ***344** peremptory writ of mandate in favor of respondent. The appeal [FN2] is from the judgment.

> FN2 Appellant in her brief has limited her appeal to that portion of the judgment

enjoining enforcement of appellant's "New Policy" of requiring prior revocable employee consent to meal credit deductions from the cash minimum wage.

I

The court below concluded that section 4 of Minimum Wage Order No. 1-74 "authorizes employers in the restaurant industry to take a credit ... for meals furnished or reasonably made available to employees without the specific written consent of such employees to have the value of such specific meals credited by employers against the minimum wage otherwise due the employees ...." Because the appellant's "new policy" would thus constitute an amendment to the order, the court held that it was beyond the scope of her authority, as only the Industrial Welfare Commission has the power to adopt or change a minimum wage order. (Lab. Code, § 1182.)

Appellant contends that the wage order is silent on the issue of consent to meal credit deductions, and that there has been no administrative interpretation of the regulation to the effect that such deductions are authorized in the absence of employee consent. Thus, appellant argues, the policy statement was within the authority of the Division of Industrial Welfare to take all proceedings necessary to enforce minimum wage regulations in accordance with the law, specifically, the prohibitions of Labor Code section 450. (Lab. Code, § § 59, 61, 1195.)

(1) Generally, the same rules of construction and interpretation which apply to statutes govern the interpretation of rules and regulations of administrative agencies. (*Cal. Drive-In Restaurant Assn.* v. *Clark*, 22 Cal.2d 287, 292 [140 P.2d 657, 147 A.L.R. 1028]; *Intoximeters, Inc. v. Younger*, 53 Cal.App.3d 262, 270 [125 Cal.Rptr. 864].) The Industrial Welfare Commission acts as a quasi-legislative body in promulgating minimum wage orders. (*Rivera v. Division of Industrial Welfare*, 265 Cal.App.2d 576, 586 [71 Cal.Rptr. 739].) (2) Of course, the cardinal rule of construction is that the court should ascertain the intent of the promulgating body so as to effectuate the intended purpose of the statute or regulation. (*East Bay Garbage Co. v. Washington Township Sanitation Co.*, 52 Cal.2d 708, 713 [344 P.2d 289]; *California Sch. Employees Assn. v. Jefferson Elementary Sch. Dist.*, 45 Cal.App.3d 683, 691 [119 Cal.Rptr. 668]; Code Civ. Proc., § 1859.) This rule has been extended to ***345** construction of administrative regulations. (*Cal. Drive-In Restaurant Assn. v. Clark, supra*.)

(3a) Thus, the commission's intent is the most significant factor in interpretation of its wage order. In reaching the conclusion that meal credit deductions without employee consent are authorized by section 4 of order No. 1-74, the trial court properly relied on two additional principles of construction. (4) First, "contemporaneous administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is clearly erroneous or unauthorized." (*Rivera v. City of Fresno*, 6 Cal.3d 132, 140 [98 Cal.Rptr. 281, 490 P.2d 793].) (5) Second, reenactment of a provision which has a meaning well-established by administrative construction is persuasive evidence that the intent of the enacting authority was to continue the same construction previously applied. (*Cooper v. Swoap*, 11 Cal.3d 856, 868 [115 Cal.Rptr. 1, 524 P.2d 97]; *Cal. M. Express. v. St. Bd. of Equalization*, 133 Cal.App.2d 237, 239-240 [283 P.2d 1063].)

(3b) Appellant urges that there was no administrative construction of the prior wage orders, but only an interpretation by the restaurant industry. The record belies this assertion. Since 1952, every minimum wage order relating to the restaurant industry has specified that "when meals are furnished by the employer *as a part of the minimum wage*, they may not be evaluated in excess of the following [cash equivalents] ...." (Italics added.) Since at least 1944, it has been the open and recognized practice of the restaurant industry for employers to take a meal credit against the minimum wage without employee consent. Division of Industrial Welfare "Policy" statements prior to the appellant's 1974 notice make no reference to any requirement of employee consent. Moreover, the commission considered a proposal that wage order No. 1-74 expressly requires employee consent to such meal credits, but this was written out of the final version of the order. Just as "[t]he sweep of the statute should not be enlarged by insertion of language which the Legislature has overtly left out" (*People v. Brannon*, 32 Cal.App.3d 971, 977 [108 Cal.Rptr. 620]), so the wage order should not be interpreted as including a limitation declined by the commission. In the face of a well-known and documented interpretation and application of the regulation over many years, the commission ratified that construction by reenacting the regulation in substantially the same form, without substantive change. ***346**

This interpretation was thus properly accepted by the

trial court as authoritatively intended by the commission in wage order No. 1-74. However, this is not dispositive of the matter, for it is clear that the administrative regulation, as interpreted, must not conflict with applicable state laws; to the extent that it does so conflict, the regulation is void.

II

(6a) Appellant contends that the meal credit provision of order No. 1- 74, as construed, violates Labor Code section 450, which provides: "No employer, or agent or officer thereof, or other person, shall compel or coerce any employee, or applicant for employment, to patronize his employer, or any other person, in the purchase of any thing of value."

Respondent argues that the meal credit provision does not permit an employer to "compel or coerce" an employee to "purchase" a meal within the meaning of section 450, but rather merely authorizes the employer to reduce his *cash* minimum wage obligation by part payment "in kind." Thus, respondent contends, the meal credit against the minimum wage otherwise payable is not a "purchase" within section 450, but is instead a partial fulfillment of the employer's minimum wage obligation; where a meal is provided an employee is not entitled to the higher cash minimum wage. Respondent urges that under Labor Code sections 1182 and 1184, [FN3] the Industrial Welfare Commission has an implied power to authorize in kind payment of wages without employee consent to such manner of payment, and the wage order as construed is a valid exercise of such authority.

> FN3 Section 1182 provides in pertinent part: "After the wage board conference and public hearing, as provided in this chapter, the commission may, upon its own motion or upon petition, fix:
> "(a) A minimum wage to be paid to employees engaged in any occupation, trade, or industry in this state, which shall not be less than a wage adequate to supply the necessary costs of proper living to, and maintain the health and welfare of such employees."
> Section 1184 provides: "After an order has been promulgated by the commission making wages ... mandatory in any occupation, trade, or industry, the commission may at any time upon its own motion, or upon petition of employers or employees reconsider such order for the purpose of altering, amending, or rescinding such order or any portion thereof. For this purpose the commission shall proceed in the same manner as prescribed for an original order. Such altered or amended order shall have the same effect as the original order."

(7) Administrative bodies and officers have only such powers as have expressly or impliedly been conferred upon them by the Constitution or ***347** by statute. (*Ferdig v. State Personnel Bd.*, 71 Cal.2d 96, 103 [77 Cal.Rptr. 224, 453 P.2d 728].) In the absence of valid statutory or constitutional authority, an administrative agency may not, under the guise of regulation, substitute its judgment for that of the Legislature. Administrative regulations in conflict with applicable statutes are null and void. (*Harris v. Alcoholic Bev. Etc. Appeals Bd.*, 228 Cal.App.2d 1, 6 [39 Cal.Rptr. 192]; *Hodge v. McCall*, 185 Cal. 330, 334 [197 P. 86].)

Certain additional principles of construction are helpful to resolution of this controversy. (8) In order that legislative intent be given effect, a statute should be construed with due regard for the ordinary meaning of the language used and in harmony with the whole system of law of which it is a part. (*Anaheim Union Water Co. v. Franchise Tax Bd.*, 26 Cal.App.3d 95, 106 [102 Cal.Rptr. 692].) (9) A remedial statute must be liberally construed so as to effectuate its object and purpose, and to suppress the mischief at which it is directed. (*City of San Jose v. Forsythe*, 261 Cal.App.2d 114, 117 [67 Cal.Rptr. 754]; *Lande v. Jurisich*, 59 Cal.App.2d 613, 616-617 [139 P.2d 657].)

(6b) Section 450 manifests a legislative intent to protect wage earners against employer coercion to purchase products or services from the employer. In the context of the present case, that section is plainly part of "the established policy of our Legislature of protecting and promoting the right of a wage earner to all wages lawfully accrued to him." (*City of Ukiah v. Fones*, 64 Cal.2d 104, 108 [48 Cal.Rptr. 865, 410 P.2d 369].) The Legislature evidently determined "that the evil thus to be guarded against was sufficiently prevalent to require legislative action, and the remedy ought not to be defeated by judicial construction if that result can reasonably be avoided." (*Lande v. Jurisich, supra*, 59 Cal.App.2d at p. 617.)

While it may be argued that "in kind" payment of wages is not technically or narrowly speaking a "compelled purchase," there is no perceptible practical difference between the two. Where an employee is not allowed the choice between cash and

in kind payment, but rather is forced to accept goods or services from his employer in lieu of cash as part of the minimum wage, the same mathematical result obtains as if the employer had paid the wages in cash with the condition that the employee spend with the employer an amount equal to the allowable credit (here, on a meal) at the end of each shift. This latter practice unquestionably violates section 450. Employers cannot be permitted to evade the salutary objectives of the statute by indirection. ***348**

Moreover, sections 1182 and 1184, urged by respondent in support of its contentions, are similarly subject to the rule of liberal construction of remedial legislation. (*California Grape etc. League* v. *Industrial Welfare Com.*, 268 Cal.App.2d 692, 698 [74 Cal.Rptr. 313].) Additionally, the statutes must be construed in harmony with section 450, so as to carry out the fundamental legislative purposes of the whole act. (*Earl Ranch, Ltd. v. Industrial Acc. Com.*, 4 Cal.2d 767, 769 [53 P.2d 154]; *Moyer v. Workmen's Comp. Appeals Bd.*, 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].) In light of the prohibition against compelled purchases in section 450, the implied power of the commission to authorize in kind payments must be limited to situations in which such manner of payment is authorized by specific and prior voluntary employee consent. This limitation is consistent with the strong public policy favoring full payment of minimum wages, which the Legislature has effectuated by making payment of less than the minimum wage unlawful. (Lab. Code, § 1197.)

The judgment is reversed with directions to the trial court to deny the petition for writ of mandate.

Rattigan, J., and Christian, J., concurred.

A petition for a rehearing was denied June 16, 1976, and respondent's petition for a hearing by the Supreme Court was denied July 15, 1976. ***349**

Cal.App.1.Dist.,1976.

California State Restaurant Ass'n v. Whitlow

END OF DOCUMENT

Estate of DENIS H. GRISWOLD, Deceased.
NORMA B. DONER-GRISWOLD, Petitioner and Respondent,
v.
FRANCIS V. SEE, Objector and Appellant.
No. S087881.

Supreme Court of California

June 21, 2001.

SUMMARY

After an individual died intestate, his wife, as administrator of the estate, filed a petition for final distribution. Based on a 1941 judgment in a bastardy proceeding in Ohio, in which the decedent's biological father had confessed paternity, an heir finder who had obtained an assignment of partial interest in the estate from the decedent's half siblings filed objections. The biological father had died before the decedent, leaving two children from his subsequent marriage. The father had never told his subsequent children about the decedent, but he had paid court-ordered child support for the decedent until he was 18 years old. The probate court denied the heir finder's petition to determine entitlement, finding that he had not demonstrated that the father was the decedent's natural parent pursuant to Prob. Code, § 6453, or that the father had acknowledged the decedent as his child pursuant to Prob. Code, § 6452, which bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent/child relationship unless the parent or relative acknowledged the child and contributed to the support or care of the child. (Superior Court of Santa Barbara County, No. B216236, Thomas Pearce Anderle, Judge.) The Court of Appeal, Second Dist., Div. Six, No. B128933, reversed.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that, since the father had acknowledged the decedent as his child and contributed to his support, the decedent's half siblings were not subject to the restrictions of Prob. Code, § 6452. Although no statutory definition of "acknowledge" appears in Prob. Code, § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had confessed paternity in the 1941 bastardy proceeding, he had acknowledged the decedent under the plain terms of the statute. The court also held that the 1941 Ohio judgment established the decedent's biological father as his natural parent for purposes of intestate succession under Prob. Code, § 6453, subd. (b). Since the identical issue was presented both in the Ohio proceeding and in this California proceeding, the Ohio proceeding bound the parties ***905** in this proceeding. (Opinion by Baxter, J., with George, C. J., Kennard, Werdegar, and Chin, JJ., concurring. Concurring opinion by Brown, J. (see p. 925).)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Parent and Child § 18--Parentage of Children-- Inheritance Rights--Parent's Acknowledgement of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.
In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent were precluded by Prob. Code, § 6452, from sharing in the intestate estate. Section 6452 bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative acknowledged the child and contributed to that child's support or care. The decedent's biological father had paid court-ordered child support for the decedent until he was 18 years old. Although no statutory definition of "acknowledge" appears in § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had appeared in a 1941 bastardy proceeding in another state, where he confessed paternity, he had acknowledged the decedent under the plain terms of § 6452. Further, even though the father had not had contact with the decedent and had not told his other children about him, the record disclosed no evidence that he disavowed paternity to anyone with knowledge of the circumstances. Neither the language nor the history of § 6452 evinces a clear intent to make inheritance contingent upon the decedent's awareness of the relatives who claim an inheritance right.

[See 12 Witkin, Summary of Cal. Law (9th ed. 1990) Wills and Probate, § § 153, 153A, 153B.]

(2) Statutes § 29--Construction--Language--Legislative Intent.
In statutory construction cases, a court's fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. A court

begins by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, the court presumes the lawmakers meant what they said, and the plain meaning of the language governs. If there is ambiguity, however, the court may then look to extrinsic sources, including the ***906** ostensible objects to be achieved and the legislative history. In such cases, the court selects the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoids an interpretation that would lead to absurd consequences.

(3) Statutes § 46--Construction--Presumptions--Legislative Intent--Judicial Construction of Certain Language.
When legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, a court may presume that the Legislature intended the same construction, unless a contrary intent clearly appears.

(4) Statutes § 20--Construction--Judicial Function.
A court may not, under the guise of interpretation, insert qualifying provisions not included in a statute.

(5a, 5b) Parent and Child § 18--Parentage of Children--Inheritance Rights--Determination of Natural Parent of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.
In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent, who had been born out of wedlock, were precluded by Prob. Code, § 6453 (only "natural parent" or relative can inherit through intestate child), from sharing in the intestate estate. Prob. Code, § 6453, subd. (b), provides that a natural parent and child relationship may be established through Fam. Code, § 7630, subd. (c), if a court order declaring paternity was entered during the father's lifetime. The decedent's father had appeared in a 1941 bastardy proceeding in Ohio, where he confessed paternity. If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. Since the Ohio bastardy proceeding decided the identical issue presented in this California proceeding, the Ohio proceeding bound the parties in this proceeding. Further, even though the decedent's mother initiated the bastardy proceeding prior to adoption of the Uniform Parentage Act, and all procedural requirements of Fam. Code, § 7630, may not have been followed, that judgment was still binding in this proceeding, since the issue adjudicated was identical to the issue that would have been presented in an action brought pursuant to the Uniform Parentage Act.

(6) Judgments § 86--Res Judicata--Collateral Estoppel--Nature of Prior Proceeding--Criminal Conviction on Guilty Plea.
A trial ***907** court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. The issue of the defendant's guilt was not fully litigated in the prior criminal proceeding; rather, the plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his or her guilt. The defendant's due process right to a civil hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources.

(7) Descent and Distribution § 1--Judicial Function.
Succession of estates is purely a matter of statutory regulation, which cannot be changed by the courts.

COUNSEL

Kitchen & Turpin, David C. Turpin; Law Office of Herb Fox and Herb Fox for Objector and Appellant.

Mullen & Henzell and Lawrence T. Sorensen for Petitioner and Respondent.

BAXTER, J.

Section 6452 of the Probate Code (all statutory references are to this code unless otherwise indicated) bars a "natural parent" or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent and child relationship unless the parent or relative "acknowledged the child" and "contributed to the support or the care of the child." In this case, we must determine whether section 6452 precludes the half siblings of a child born out of wedlock from sharing in the child's intestate estate where the record is undisputed that their father appeared in an Ohio court, admitted paternity of the child, and paid court-ordered child

support until the child was 18 years old. Although the father and the out-of-wedlock child apparently never met or communicated, and the half siblings did not learn of the child's existence until after both the child and the father died, there is no indication that the father ever denied paternity or knowledge of the out-of-wedlock child to persons who were aware of the circumstances.

Since succession to estates is purely a matter of statutory regulation, our resolution of this issue requires that we ascertain the intent of the lawmakers who enacted section 6452. Application of settled principles of statutory ***908** construction compels us to conclude, on this uncontroverted record, that section 6452 does not bar the half siblings from sharing in the decedent's estate.

Factual and Procedural Background

Denis H. Griswold died intestate in 1996, survived by his wife, Norma B. Doner-Griswold. Doner-Griswold petitioned for and received letters of administration and authority to administer Griswold's modest estate, consisting entirely of separate property.

In 1998, Doner-Griswold filed a petition for final distribution, proposing a distribution of estate property, after payment of attorney's fees and costs, to herself as the surviving spouse and sole heir. Francis V. See, a self-described "forensic genealogist" (heir hunter) who had obtained an assignment of partial interest in the Griswold estate from Margaret Loera and Daniel Draves, [FN1] objected to the petition for final distribution and filed a petition to determine entitlement to distribution.

> FN1 California permits heirs to assign their interests in an estate, but such assignments are subject to court scrutiny. (See § 11604.)

See and Doner-Griswold stipulated to the following background facts pertinent to See's entitlement petition.

Griswold was born out of wedlock to Betty Jane Morris on July 12, 1941 in Ashland, Ohio. The birth certificate listed his name as Denis Howard Morris and identified John Edward Draves of New London, Ohio as the father. A week after the birth, Morris filed a "bastardy complaint" [FN2] in the juvenile court in Huron County, Ohio and swore under oath that Draves was the child's father. In September of 1941, Draves appeared in the bastardy proceeding and "confessed in Court that the charge of the plaintiff herein is true." The court adjudged Draves to be the "reputed father" of the child, and ordered Draves to pay medical expenses related to Morris's pregnancy as well as $5 per week for child support and maintenance. Draves complied, and for 18 years paid the court-ordered support to the clerk of the Huron County court.

> FN2 A "bastardy proceeding" is an archaic term for a paternity suit. (Black's Law Dict. (7th ed. 1999) pp. 146, 1148.)

Morris married Fred Griswold in 1942 and moved to California. She began to refer to her son as "Denis Howard Griswold," a name he used for the rest of his life. For many years, Griswold believed Fred Griswold was his father. At some point in time, either after his mother and Fred Griswold ***909** divorced in 1978 or after his mother died in 1983, Griswold learned that Draves was listed as his father on his birth certificate. So far as is known, Griswold made no attempt to contact Draves or other members of the Draves family.

Meanwhile, at some point after Griswold's birth, Draves married in Ohio and had two children, Margaret and Daniel. Neither Draves nor these two children had any communication with Griswold, and the children did not know of Griswold's existence until after Griswold's death in 1996. Draves died in 1993. His last will and testament, dated July 22, 1991, made no mention of Griswold by name or other reference. Huron County probate documents identified Draves's surviving spouse and two children-Margaret and Daniel-as the only heirs.

Based upon the foregoing facts, the probate court denied See's petition to determine entitlement. In the court's view, See had not demonstrated that Draves was Griswold's "natural parent" or that Draves "acknowledged" Griswold as his child as required by section 6452.

The Court of Appeal disagreed on both points and reversed the order of the probate court. We granted Doner-Griswold's petition for review.

Discussion

(1a) Denis H. Griswold died without a will, and his estate consists solely of separate property. Consequently, the intestacy rules codified at sections

6401 and 6402 are implicated. Section 6401, subdivision (c) provides that a surviving spouse's share of intestate separate property is one-half "[w]here the decedent leaves no issue but leaves a parent or parents or their issue or the issue of either of them." (§ 6401, subd. (c)(2)(B).) Section 6402, subdivision (c) provides that the portion of the intestate estate not passing to the surviving spouse under section 6401 passes as follows: "If there is no surviving issue or parent, to the issue of the parents or either of them, the issue taking equally if they are all of the same degree of kinship to the decedent ...."

As noted, Griswold's mother (Betty Jane Morris) and father (John Draves) both predeceased him. Morris had no issue other than Griswold and Griswold himself left no issue. Based on these facts, See contends that Doner-Griswold is entitled to one-half of Griswold's estate and that Draves's issue (See's assignors, Margaret and Daniel) are entitled to the other half pursuant to sections 6401 and 6402.

Because Griswold was born out of wedlock, three additional Probate Code provisions-section 6450, section 6452, and section 6453-must be considered. ***910**

As relevant here, section 6450 provides that "a relationship of parent and child exists for the purpose of determining intestate succession by, through, or from a person" where "[t]he relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents." (*Id.*, subd. (a).)

Notwithstanding section 6450's general recognition of a parent and child relationship in cases of unmarried natural parents, section 6452 restricts the ability of such parents and their relatives to inherit from a child as follows: "If a child is born out of wedlock, neither a *natural parent* nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied: [¶] (a) The parent or a relative of the parent *acknowledged the child.* [¶] (b) The parent or a relative of the parent contributed to the support or the care of the child." (Italics added.)

Section 6453, in turn, articulates the criteria for determining whether a person is a "natural parent" within the meaning of sections 6450 and 6452. A more detailed discussion of section 6453 appears *post*, at part B.

It is undisputed here that section 6452 governs the determination whether Margaret, Daniel, and See (by assignment) are entitled to inherit from Griswold. It is also uncontroverted that Draves contributed court-ordered child support for 18 years, thus satisfying subdivision (b) of section 6452. At issue, however, is whether the record establishes all the remaining requirements of section 6452 as a matter of law. First, did Draves acknowledge Griswold within the meaning of section 6452, subdivision (a)? Second, did the Ohio judgment of reputed paternity establish Draves as the natural parent of Griswold within the contemplation of sections 6452 and 6453? We address these issues in order.

A. *Acknowledgement*

As indicated, section 6452 precludes a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative "acknowledged the child." (*Id.*, subd. (a).) On review, we must determine whether Draves acknowledged Griswold within the contemplation of the statute by confessing to paternity in court, where the record reflects no other acts of acknowledgement, but no disavowals either.

(2) In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [***911**105 Cal.Rptr.2d 457, 19 P.3d 1196].) "We begin by examining the statutory language, giving the words their usual and ordinary meaning." (*Ibid.*; *People v. Lawrence* (2000) 24 Cal.4th 219, 230 [99 Cal.Rptr.2d 570, 6 P.3d 228].) If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. (*Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272; *People v. Lawrence*, *supra*, 24 Cal.4th at pp. 230-231.) If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. (*Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272.) In such cases, we " ' "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." ' " (*Ibid.*)

(1b) Section 6452 does not define the word

"acknowledged." Nor does any other provision of the Probate Code. At the outset, however, we may logically infer that the word refers to conduct other than that described in subdivision (b) of section 6452, i.e., contributing to the child's support or care; otherwise, subdivision (a) of the statute would be surplusage and unnecessary.

Although no statutory definition appears, the common meaning of "acknowledge " is "to admit to be true or as stated; confess." (Webster's New World Dict. (2d ed. 1982) p. 12; see Webster's 3d New Internat. Dict. (1981) p. 17 ["to show by word or act that one has knowledge of and agrees to (a fact or truth) ... [or] concede to be real or true ... [or] admit"].) Were we to ascribe this common meaning to the statutory language, there could be no doubt that section 6452's acknowledgement requirement is met here. As the stipulated record reflects, Griswold's natural mother initiated a bastardy proceeding in the Ohio juvenile court in 1941 in which she alleged that Draves was the child's father. Draves appeared in that proceeding and publicly " confessed" that the allegation was true. There is no evidence indicating that Draves did not confess knowingly and voluntarily, or that he later denied paternity or knowledge of Griswold to those who were aware of the circumstances. [FN3] Although the record establishes that Draves did not speak of Griswold to Margaret and Daniel, there is no evidence suggesting he sought to actively conceal the facts from them or anyone else. Under the plain terms of section 6452, the only sustainable conclusion on this record is that Draves acknowledged Griswold.

> FN3 Huron County court documents indicate that at least two people other than Morris, one of whom appears to have been a relative of Draves, had knowledge of the bastardy proceeding.

Although the facts here do not appear to raise any ambiguity or uncertainty as to the statute's application, we shall, in an abundance of caution, ***912** test our conclusion against the general purpose and legislative history of the statute. (See *Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 274; *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 93 [40 Cal.Rptr.2d 839, 893 P.2d 1160].)

The legislative bill proposing enactment of former section 6408.5 of the Probate Code (Stats. 1983, ch. 842, § 55, p. 3084; Stats. 1984, ch. 892, § 42, p. 3001), the first modern statutory forerunner to section 6452, was introduced to effectuate the Tentative Recommendation Relating to Wills and Intestate Succession of the California Law Revision Commission (the Commission). (See 17 Cal. Law Revision Com. Rep. (1984) p. 867, referring to 16 Cal. Law Revision Com. Rep. (1982) p. 2301.) According to the Commission, which had been solicited by the Legislature to study and recommend changes to the then existing Probate Code, the proposed comprehensive legislative package to govern wills, intestate succession, and related matters would "provide rules that are more likely to carry out the intent of the testator or, if a person dies without a will, the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.) The Commission also advised that the purpose of the legislation was to "make probate more efficient and expeditious." (*Ibid.*) From all that appears, the Legislature shared the Commission's views in enacting the legislative bill of which former section 6408.5 was a part. (See 17 Cal. Law Revision Com. Rep., *supra*, at p. 867.)

Typically, disputes regarding parental acknowledgement of a child born out of wedlock involve factual assertions that are made by persons who are likely to have direct financial interests in the child's estate and that relate to events occurring long before the child's death. Questions of credibility must be resolved without the child in court to corroborate or rebut the claims of those purporting to have witnessed the parent's statements or conduct concerning the child. Recognition that an in-court admission of the parent and child relationship constitutes powerful evidence of an acknowledgement under section 6452 would tend to reduce litigation over such matters and thereby effectuate the legislative objective to "make probate more efficient and expeditious." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.)

Additionally, construing the acknowledgement requirement to be met in circumstances such as these is neither illogical nor absurd with respect to the intent of an intestate decedent. Put another way, where a parent willingly acknowledged paternity in an action initiated to establish the parent-child relationship and thereafter was never heard to deny such relationship (§ 6452, subd. (a)), and where that parent paid all court-ordered support for that child for 18 years (*id.*, subd. (b)), it cannot be said that the participation ***913** of that parent or his relative in the

estate of the deceased child is either (1) so illogical that it cannot represent the intent that one without a will is most likely to have had (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319) or (2) "so absurd as to make it manifest that it could not have been intended" by the Legislature (*Estate of De Cigaran* (1907) 150 Cal. 682, 688 [89 P. 833] [construing Civ. Code, former § 1388 as entitling the illegitimate half sister of an illegitimate decedent to inherit her entire intestate separate property to the exclusion of the decedent's surviving husband]).

There is a dearth of case law pertaining to section 6452 or its predecessor statutes, but what little there is supports the foregoing construction. Notably, *Lozano v. Scalier* (1996) 51 Cal.App.4th 843 [59 Cal.Rptr.2d 346] (*Lozano*), the only prior decision directly addressing section 6452's acknowledgement requirement, declined to read the statute as necessitating more than what its plain terms call for.

In *Lozano*, the issue was whether the trial court erred in allowing the plaintiff, who was the natural father of a 10-month-old child, to pursue a wrongful death action arising out of the child's accidental death. The wrongful death statute provided that where the decedent left no spouse or child, such an action may be brought by the persons "who would be entitled to the property of the decedent by intestate succession." (Code Civ. Proc., § 377.60, subd. (a).) Because the child had been born out of wedlock, the plaintiff had no right to succeed to the estate unless he had both "acknowledged the child " and "contributed to the support or the care of the child" as required by section 6452. *Lozano* upheld the trial court's finding of acknowledgement in light of evidence in the record that the plaintiff had signed as "Father" on a medical form five months before the child's birth and had repeatedly told family members and others that he was the child's father. (*Lozano*, *supra*, 51 Cal.App.4th at pp. 845, 848.)

Significantly, *Lozano* rejected arguments that an acknowledgement under Probate Code section 6452 must be (1) a witnessed writing and (2) made after the child was born so that the child is identified. In doing so, *Lozano* initially noted there were no such requirements on the face of the statute. (*Lozano*, *supra*, 51 Cal.App.4th at p. 848.) *Lozano* next looked to the history of the statute and made two observations in declining to read such terms into the statutory language. First, even though the Legislature had previously required a witnessed writing in cases where an illegitimate child sought to inherit from the father's estate, it repealed such requirement in 1975 in an apparent effort to ease the evidentiary proof of the parent-child relationship. (*Ibid.*) Second, other statutes that required a parent-child relationship expressly contained more formal acknowledgement requirements for the assertion of certain other rights or privileges. (See *id*. at p. 849, citing ***914**Code Civ. Proc., § 376, subd. (c), Health & Saf. Code, § 102750, & Fam. Code, § 7574.) Had the Legislature wanted to impose more stringent requirements for an acknowledgement under section 6452, *Lozano* reasoned, it certainly had precedent for doing so. (*Lozano*, *supra*, 51 Cal.App.4th at p. 849.)

Apart from Probate Code section 6452, the Legislature had previously imposed an acknowledgement requirement in the context of a statute providing that a father could legitimate a child born out of wedlock for all purposes "by publicly acknowledging it as his own." (See Civ. Code, former § 230.) [FN4] Since that statute dealt with an analogous subject and employed a substantially similar phrase, we address the case law construing that legislation below.

> FN4 Former section 230 of the Civil Code provided: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter do not apply to such an adoption." (Enacted 1 Cal. Civ. Code (1872) § 230, p. 68, repealed by Stats. 1975, ch. 1244, § 8, p. 3196.)
> In 1975, the Legislature enacted California's Uniform Parentage Act, which abolished the concept of legitimacy and replaced it with the concept of parentage. (See *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 828-829 [4 Cal.Rptr.2d 615, 823 P.2d 1216].)

In *Blythe v. Ayres* (1892) 96 Cal. 532 [31 P. 915], decided over a century ago, this court determined that the word "acknowledge," as it appeared in former section 230 of the Civil Code, had no technical meaning. (*Blythe v. Ayers*, *supra*, 96 Cal. at p. 577.) We therefore employed the word's common meaning,

which was " 'to own or admit the knowledge of.' " (*Ibid.* [relying upon Webster's definition]; see also *Estate of Gird* (1910) 157 Cal. 534, 542 [108 P. 499].) Not only did that definition endure in case law addressing legitimation (*Estate of Wilson* (1958) 164 Cal.App.2d 385, 388- 389 [330 P.2d 452]; see *Estate of Gird*, *supra*, 157 Cal. at pp. 542- 543), but, as discussed, the word retains virtually the same meaning in general usage today-"to admit to be true or as stated; confess." (Webster's New World Dict., *supra*, at p. 12; see Webster's 3d New Internat. Dict., *supra*, at p. 17.)

Notably, the decisions construing former section 230 of the Civil Code indicate that its public acknowledgement requirement would have been met where a father made a single confession in court to the paternity of a child.

In *Estate of McNamara* (1919) 181 Cal. 82 [183 P. 552, 7 A.L.R. 313], for example, we were emphatic in recognizing that a single unequivocal act could satisfy the acknowledgement requirement for purposes of statutory legitimation. Although the record in that case had contained additional evidence of the father's acknowledgement, we focused our attention on his ***915** one act of signing the birth certificate and proclaimed: "A more public acknowledgement than the act of [the decedent] in signing the child's birth certificate describing himself as the father, it would be difficult to imagine." (*Id.* at pp. 97-98.)

Similarly, in *Estate of Gird*, *supra*, 157 Cal. 534, we indicated in dictum that "a public avowal, made in the courts" would constitute a public acknowledgement under former section 230 of the Civil Code. (*Estate of Gird*, *supra*, 157 Cal. at pp. 542-543.)

Finally, in *Wong v. Young* (1947) 80 Cal.App.2d 391 [181 P.2d 741], a man's admission of paternity in a verified pleading, made in an action seeking to have the man declared the father of the child and for child support, was found to have satisfied the public acknowledgement requirement of the legitimation statute. (*Id.* at pp. 393-394.) Such admission was also deemed to constitute an acknowledgement under former Probate Code section 255, which had allowed illegitimate children to inherit from their fathers under an acknowledgement requirement that was even more stringent than that contained in Probate Code section 6452. [FN5] (*Wong v. Young*, *supra*, 80 Cal.App.2d at p. 394; see also *Estate of De Laveaga* (1904) 142 Cal. 158, 168 [75 P. 790] [indicating in dictum that, under a predecessor to Probate Code section 255, father sufficiently acknowledged an illegitimate child in a single witnessed writing declaring the child as his son].) Ultimately, however, legitimation of the child under former section 230 of the Civil Code was not found because two other of the statute's express requirements, i.e., receipt of the child into the father's family and the father's otherwise treating the child as his legitimate child (see *ante*, fn. 4), had not been established. (*Wong v. Young*, *supra*, 80 Cal.App.2d at p. 394.)

> FN5 Section 255 of the former Probate Code provided in pertinent part: " ' Every illegitimate child, whether born or conceived but unborn, in the event of his subsequent birth, is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock ....' " (*Estate of Ginochio* (1974) 43 Cal.App.3d 412, 416 [117 Cal.Rptr. 565], italics omitted.)

Although the foregoing authorities did not involve section 6452, their views on parental acknowledgement of out-of-wedlock children were part of the legal landscape when the first modern statutory forerunner to that provision was enacted in 1985. (See former § 6408.5, added by Stats. 1983, ch. 842, § 55, p. 3084, and amended by Stats. 1984, ch. 892, § 42, p. 3001.) (3) Where, as here, legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the ***916** same construction, unless a contrary intent clearly appears. (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437 [35 Cal.Rptr.2d 155]; see also *People v. Masbruch* (1996) 13 Cal.4th 1001, 1007 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557 [147 Cal.Rptr. 165, 580 P.2d 665].) (1c) Since no evidence of a contrary intent clearly appears, we may reasonably infer that the types of acknowledgement formerly deemed sufficient for the legitimation statute (and former § 255, as well) suffice for purposes of intestate succession under

section 6452. [FN6]

> FN6 Probate Code section 6452's acknowledgement requirement differs from that found in former section 230 of the Civil Code, in that section 6452 does not require a parent to "publicly" acknowledge a child born out of wedlock. That difference, however, fails to accrue to Doner-Griswold's benefit. If anything, it suggests that the acknowledgement contemplated in section 6452 encompasses a broader spectrum of conduct than that associated with the legitimation statute.

Doner-Griswold disputes whether the acknowledgement required by Probate Code section 6452 may be met by a father's single act of acknowledging a child in court. In her view, the requirement contemplates a situation where the father establishes an ongoing parental relationship with the child or otherwise acknowledges the child's existence to his subsequent wife and children. To support this contention, she relies on three other authorities addressing acknowledgement under former section 230 of the Civil Code: *Blythe v. Ayers*, *supra*, 96 Cal. 532, *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, and *Estate of Maxey* (1967) 257 Cal.App.2d 391 [64 Cal.Rptr. 837].

In *Blythe v. Ayres*, *supra*, 96 Cal. 532, the father never saw his illegitimate child because she resided in another country with her mother. Nevertheless, he "was garrulous upon the subject" of his paternity and "it was his common topic of conversation." (*Id.* at p. 577.) Not only did the father declare the child to be his child, "to all persons, upon all occasions," but at his request the child was named and baptized with his surname. (*Ibid.*) Based on the foregoing, this court remarked that "it could almost be held that he shouted it from the house-tops." (*Ibid.*) Accordingly, we concluded that the father's public acknowledgement under former section 230 of the Civil Code could "hardly be considered debatable." (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577.)

In *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, the evidence showed that the father had acknowledged to his wife that he was the father of a child born to another woman. (*Id.* at p. 389.) Moreover, he had introduced the child as his own on many occasions, including at the funeral of his mother. (*Ibid.*) In light of such evidence, the Court of Appeal upheld the trial court's finding that the father had publicly acknowledged the child within the contemplation of the legitimation statute. ***917**

In *Estate of Maxey*, *supra*, 257 Cal.App.2d 391, the Court of Appeal found ample evidence supporting the trial court's determination that the father publicly acknowledged his illegitimate son for purposes of legitimation. The father had, on several occasions, visited the house where the child lived with his mother and asked about the child's school attendance and general welfare. (*Id.* at p. 397.) The father also, in the presence of others, had asked for permission to take the child to his own home for the summer, and, when that request was refused, said that the child was his son and that he should have the child part of the time. (*Ibid.*) In addition, the father had addressed the child as his son in the presence of other persons. (*Ibid.*)

Doner-Griswold correctly points out that the foregoing decisions illustrate the principle that the existence of acknowledgement must be decided on the circumstances of each case. (*Estate of Baird* (1924) 193 Cal. 225, 277 [223 P. 974].) In those decisions, however, the respective fathers had not confessed to paternity in a legal action. Consequently, the courts looked to what other forms of public acknowledgement had been demonstrated by fathers. (See also *Lozano*, *supra*, 51 Cal.App.4th 843 [examining father's acts both before and after child's birth in ascertaining acknowledgement under § 6452].)

That those decisions recognized the validity of different forms of acknowledgement should not detract from the weightiness of a father's in-court acknowledgement of a child in an action seeking to establish the existence of a parent and child relationship. (See *Estate of Gird*, *supra*, 157 Cal. at pp. 542-543; *Wong v. Young*, *supra*, 80 Cal.App.2d at pp. 393-394.) As aptly noted by the Court of Appeal below, such an acknowledgement is a critical one that typically leads to a paternity judgment and a legally enforceable obligation of support. Accordingly, such acknowledgements carry as much, if not greater, significance than those made to certain select persons (*Estate of Maxey*, *supra*, 257 Cal.App.2d at p. 397) or "shouted ... from the house-tops " (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577).

Doner-Griswold's authorities do not persuade us that section 6452 should be read to require that a father

have personal contact with his out-of-wedlock child, that he make purchases for the child, that he receive the child into his home and other family, or that he treat the child as he does his other children. First and foremost, the language of section 6452 does not support such requirements. (See *Lozano*, *supra*, 51 Cal.App.4th at p. 848.) (4) We may not, under the guise of interpretation, insert qualifying provisions not included in the statute. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 [45 Cal.Rptr.2d 279, 902 P.2d 297].)

(1d) Second, even though *Blythe v. Ayres*, *supra*, 96 Cal. 532, *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, and *Estate of Maxey*, *supra*, ***918**257 Cal.App.2d 391, variously found such factors significant for purposes of legitimation, their reasoning appeared to flow directly from the express terms of the controlling statute. In contrast to Probate Code section 6452, former section 230 of the Civil Code provided that the legitimation of a child born out of wedlock was dependent upon three distinct conditions: (1) that the father of the child "publicly acknowledg[e] it as his own"; (2) that he "receiv[e] it as such, with the consent of his wife, if he is married, into his family"; and (3) that he "otherwise treat[] it as if it were a legitimate child." (*Ante*, fn. 4; see *Estate of De Laveaga*, *supra*, 142 Cal. at pp. 168-169 [indicating that although father acknowledged his illegitimate son in a single witnessed writing, legitimation statute was not satisfied because the father never received the child into his family and did not treat the child as if he were legitimate].) That the legitimation statute contained such explicit requirements, while section 6452 requires only a natural parent's acknowledgement of the child and contribution toward the child's support or care, strongly suggests that the Legislature did not intend for the latter provision to mirror the former in all the particulars identified by Doner-Griswold. (See *Lozano*, *supra*, 51 Cal.App.4th at pp. 848-849; compare with Fam. Code, § 7611, subd. (d) [a man is "presumed" to be the natural father of a child if "[h]e receives the child into his home and openly holds out the child as his natural child"].)

In an attempt to negate the significance of Draves's in-court confession of paternity, Doner-Griswold emphasizes the circumstance that Draves did not tell his two other children of Griswold's existence. The record here, however, stands in sharp contrast to the primary authority she offers on this point. *Estate of Baird*, *supra*, 193 Cal. 225, held there was no public acknowledgement under former section 230 of the Civil Code where the decedent admitted paternity of a child to the child's mother and their mutual acquaintances but actively concealed the child's existence and his relationship to the child's mother from his own mother and sister, with whom he had intimate and affectionate relations. In that case, the decedent not only failed to tell his relatives, family friends, and business associates of the child (193 Cal. at p. 252), but he affirmatively denied paternity to a half brother and to the family coachman (*id.* at p. 277). In addition, the decedent and the child's mother masqueraded under a fictitious name they assumed and gave to the child in order to keep the decedent's mother and siblings in ignorance of the relationship. (*Id.* at pp. 260-261.) In finding that a public acknowledgement had not been established on such facts, *Estate of Baird* stated: "A distinction will be recognized between a mere failure to disclose or publicly acknowledge paternity and a willful misrepresentation in regard to it; in such circumstances there must be no purposeful concealment of the fact of paternity. " (*Id.* at p. 276.) ***919**

Unlike the situation in *Estate of Baird*, Draves confessed to paternity in a formal legal proceeding. There is no evidence that Draves thereafter disclaimed his relationship to Griswold to people aware of the circumstances (see *ante*, fn. 3), or that he affirmatively denied he was Griswold's father despite his confession of paternity in the Ohio court proceeding. Nor is there any suggestion that Draves engaged in contrivances to prevent the discovery of Griswold's existence. In light of the obvious dissimilarities, Doner-Griswold's reliance on *Estate of Baird* is misplaced.

Estate of Ginochio, *supra*, 43 Cal.App.3d 412, likewise, is inapposite. That case held that a judicial determination of paternity following a vigorously contested hearing did not establish an acknowledgement sufficient to allow an illegitimate child to inherit under section 255 of the former Probate Code. (See *ante*, fn. 5.) Although the court noted that the decedent ultimately paid the child support ordered by the court, it emphasized the circumstance that the decedent was declared the child's father *against his will* and at no time did he admit he was the father, or sign any writing acknowledging publicly or privately such fact, or otherwise have contact with the child. (*Estate of*

Ginochio, *supra*, 43 Cal.App.3d at pp. 416-417.) Here, by contrast, Draves did not contest paternity, vigorously or otherwise. Instead, Draves stood before the court and openly admitted the parent and child relationship, and the record discloses no evidence that he subsequently disavowed such admission to anyone with knowledge of the circumstances. On this record, section 6452's acknowledgement requirement has been satisfied by a showing of what Draves did and did not do, not by the mere fact that paternity had been judicially declared.

Finally, Doner-Griswold contends that a 1996 amendment of section 6452 evinces the Legislature's unmistakable intent that a decedent's estate may not pass to siblings who had no contact with, or were totally unknown to, the decedent. As we shall explain, that contention proves too much.

Prior to 1996, section 6452 and a predecessor statute, former section 6408, expressly provided that their terms did not apply to "a natural brother or a sister of the child" born out of wedlock. [FN7] In construing former section 6408, *Estate of Corcoran* (1992) 7 Cal.App.4th 1099 [9 Cal.Rptr.2d 475] held that a half sibling was a "natural brother or sister" within the meaning of such ***920** exception. That holding effectively allowed a half sibling and the issue of another half sibling to inherit from a decedent's estate where there had been no parental acknowledgement or support of the decedent as ordinarily required. In direct response to *Estate of Corcoran*, the Legislature amended section 6452 by eliminating the exception for natural siblings and their issue. (Stats. 1996, ch. 862, § 15; see Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as amended June 3, 1996, pp. 17-18 (Assembly Bill No. 2751).) According to legislative documents, the Commission had recommended deletion of the statutory exception because it "creates an undesirable risk that the estate of the deceased out-of-wedlock child will be claimed by siblings with whom the decedent had no contact during lifetime, and of whose existence the decedent was unaware." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as introduced Feb. 22, 1996, p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.)

> FN7 Former section 6408, subdivision (d) provided: "If a child is born out of wedlock, neither a parent nor a relative of a parent (except for the issue of the child *or a natural brother or sister of the child or the issue of that brother or sister*) inherits from or through the child on the basis of the relationship of parent and child between that parent and child unless both of the following requirements are satisfied: [¶] (1) The parent or a relative of the parent acknowledged the child. [¶] (2) The parent or a relative of the parent contributed to the support or the care of the child. " (Stats. 1990, ch. 79, § 14, p. 722, italics added.)

This legislative history does not compel Doner-Griswold's construction of section 6452. Reasonably read, the comments of the Commission merely indicate its concern over the "undesirable risk" that unknown siblings could rely on the statutory exception to make claims against estates. Neither the language nor the history of the statute, however, evinces a clear intent to make inheritance contingent upon the decedent's awareness of or contact with such relatives. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.) Indeed, had the Legislature intended to categorically preclude intestate succession by a natural parent or a relative of that parent who had no contact with or was unknown to the deceased child, it could easily have so stated. Instead, by deleting the statutory exception for natural siblings, thereby subjecting siblings to section 6452's dual requirements of acknowledgement and support, the Legislature acted to prevent sibling inheritance under the type of circumstances presented in *Estate of Corcoran*, *supra*, 7 Cal.App.4th 1099, and to substantially reduce the risk noted by the Commission. [FN8] ***921**

> FN8 We observe that, under certain former versions of Ohio law, a father's confession of paternity in an Ohio juvenile court proceeding was not the equivalent of a formal probate court "acknowledgement" that would have allowed an illegitimate child to inherit from the father in that state. (See *Estate of Vaughan* (2001) 90 Ohio St.3d 544 [740 N.E.2d 259, 262- 263].) Here, however, Doner-Griswold does not dispute that the right of the succession claimants to succeed to Griswold's property is governed by the law of Griswold's domicile, i.e., California law, not the law of the claimants' domicile or the law of the

place where Draves's acknowledgement occurred. (Civ. Code, § § 755, 946; see *Estate of Lund* (1945) 26 Cal.2d 472, 493-496 [159 P.2d 643, 162 A.L.R. 606] [where father died domiciled in California, his out-of-wedlock son could inherit where all the legitimation requirements of former § 230 of the Civ. Code were met, even though the acts of legitimation occurred while the father and son were domiciled in two other states wherein such acts were not legally sufficient].)

B. *Requirement of a Natural Parent and Child Relationship*

(5a) Section 6452 limits the ability of a "natural parent" or "a relative of that parent" to inherit from or through the child "on the basis of the parent and child relationship between that parent and the child."

Probate Code section 6453 restricts the means by which a relationship of a natural parent to a child may be established for purposes of intestate succession. [FN9] (See *Estate of Sanders* (1992) 2 Cal.App.4th 462, 474-475 [3 Cal.Rptr.2d 536].) Under section 6453, subdivision (a), a natural parent and child relationship is established where the relationship is presumed under the Uniform Parentage Act and not rebutted. (Fam. Code, § 7600 et seq.) It is undisputed, however, that none of those presumptions applies in this case.

FN9 Section 6453 provides in full: "For the purpose of determining whether a person is a 'natural parent' as that term is used is this chapter: [¶] (a) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 3 (commencing with Section 7600) of Division 12 of the Family Code. [¶] (b) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of Section 7630 of the Family Code unless any of the following conditions exist: [¶] (1) A court order was entered during the father's lifetime declaring paternity. [¶] (2) Paternity is established by clear and convincing evidence that the father has openly held out the child as his own. [¶] (3) It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence."

Alternatively, and as relevant here, under Probate Code section 6453, subdivision (b), a natural parent and child relationship may be established pursuant to section 7630, subdivision (c) of the Family Code, [FN10] if a court order was entered during the father's lifetime declaring paternity. [FN11] (§ 6453, subd. (b)(1).)

FN10 Family Code section 7630, subdivision (c) provides in pertinent part: "An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7611 ... may be brought by the child or personal representative of the child, the Department of Child Support Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. An action under this subdivision shall be consolidated with a proceeding pursuant to Section 7662 if a proceeding has been filed under Chapter 5 (commencing with Section 7660). The parental rights of the alleged natural father shall be determined as set forth in Section 7664."

FN11 See makes no attempt to establish Draves's natural parent status under other provisions of section 6453, subdivision (b).

See contends the question of Draves's paternity was fully and finally adjudicated in the 1941 bastardy proceeding in Ohio. That proceeding, he ***922** argues, satisfies both the Uniform Parentage Act and the Probate Code, and should be binding on the parties here.

If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. (*Ruddock v. Ohls* (1979) 91 Cal.App.3d 271, 276 [154 Cal.Rptr. 87].) California courts generally recognize the importance of a final determination of paternity. (E.g., *Weir v.*

Ferreira (1997) 59 Cal.App.4th 1509, 1520 [70 Cal.Rptr.2d 33] (*Weir*); *Guardianship of Claralyn S.* (1983) 148 Cal.App.3d 81, 85 [195 Cal.Rptr. 646]; cf. *Estate of Camp* (1901) 131 Cal. 469, 471 [63 P. 736] [same for adoption determinations].)

Doner-Griswold does not dispute that the parties here are in privity with, or claim inheritance through, those who are bound by the bastardy judgment or are estopped from attacking it. (See *Weir*, *supra*, 59 Cal.App.4th at pp. 1516- 1517, 1521.) Instead, she contends See has not shown that the issue adjudicated in the Ohio bastardy proceeding is identical to the issue presented here, that is, whether Draves was the natural parent of Griswold.

Although we have found no California case directly on point, one Ohio decision has recognized that a bastardy judgment rendered in Ohio in 1950 was res judicata of any proceeding that might have been brought under the Uniform Parentage Act. (*Birman v. Sproat* (1988) 47 Ohio App.3d 65 [546 N.E.2d 1354, 1357] [child born out of wedlock had standing to bring will contest based upon a paternity determination in a bastardy proceeding brought during testator's life]; see also Black's Law Dict., *supra*, at pp. 146, 1148 [equating a bastardy proceeding with a paternity suit].) Yet another Ohio decision found that parentage proceedings, which had found a decedent to be the "reputed father" of a child, [FN12] satisfied an Ohio legitimation statute and conferred standing upon the illegitimate child to contest the decedent's will where the father-child relationship was established prior to the decedent's death. (*Beck v. Jolliff* (1984) 22 Ohio App.3d 84 [489 N.E.2d 825, 829]; see also *Estate of Hicks* (1993) 90 Ohio App.3d 483 [629 N.E.2d 1086, 1088-1089] [parentage issue must be determined prior to the father's death to the extent the parent-child relationship is being established under the chapter governing descent and distribution].) While we are not bound to follow these Ohio authorities, they persuade us that the 1941 bastardy proceeding decided the identical issue presented here.

> FN12 The term "reputed father" appears to have reflected the language of the relevant Ohio statute at or about the time of the 1941 bastardy proceeding. (See *State ex rel. Discus v. Van Dorn* (1937) 56 Ohio App. 82 [8 Ohio Op. 393, 10 N.E.2d 14, 16].)

Next, Doner-Griswold argues the Ohio judgment should not be given res judicata effect because the bastardy proceeding was quasi-criminal in nature. ***923** It is her position that Draves's confession may have reflected only a decision to avoid a jury trial instead of an adjudication of the paternity issue on the merits.

To support this argument, Doner-Griswold relies upon *Pease v. Pease* (1988) 201 Cal.App.3d 29 [246 Cal.Rptr. 762] (*Pease*). In that case, a grandfather was sued by his grandchildren and others in a civil action alleging the grandfather's molestation of the grandchildren. When the grandfather cross-complained against his former wife for apportionment of fault, she filed a demurrer contending that the grandfather was collaterally estopped from asserting the negligent character of his acts by virtue of his guilty plea in a criminal proceeding involving the same issues. On appeal, the judgment dismissing the cross-complaint was reversed. (6) The appellate court reasoned that a trial court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. "The issue of appellant's guilt was not fully litigated in the prior criminal proceeding; rather, appellant's plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his guilt. Appellant's due process right to a hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources." (*Id.* at p. 34, fn. omitted.)

(5b) Even assuming, for purposes of argument only, that *Pease*'s reasoning may properly be invoked where the father's admission of paternity occurred in a bastardy proceeding (see *Reams v. State ex rel. Favors* (1936) 53 Ohio App. 19 [6 Ohio Op. 501, 4 N.E.2d 151, 152] [indicating that a bastardy proceeding is more civil than criminal in character]), the circumstances here do not call for its application. Unlike the situation in *Pease*, neither the in-court admission nor the resulting paternity judgment at issue is being challenged by the father (Draves). Moreover, neither the father, nor those claiming a right to inherit through him, seek to litigate the paternity issue. Accordingly, the father's due process rights are not at issue and there is no need to determine whether such rights might outweigh any countervailing need to limit litigation or conserve judicial resources. (See *Pease*, *supra*, 201 Cal.App.3d at p. 34.)

Additionally, the record fails to support any claim that Draves's confession merely reflected a compromise. Draves, of course, is no longer living and can offer no explanation as to why he admitted paternity in the bastardy proceeding. Although Doner-Griswold suggests that Draves confessed to avoid the publicity of a jury trial, and not because the paternity charge had merit, that suggestion is purely speculative and finds no evidentiary support in the record. ***924**

Finally, Doner-Griswold argues that See and Griswold's half siblings do not have standing to seek the requisite paternity determination pursuant to the Uniform Parentage Act under section 7630, subdivision (c) of the Family Code. The question here, however, is whether the judgment in the bastardy proceeding initiated by Griswold's mother forecloses Doner-Griswold's relitigation of the parentage issue.

Although Griswold's mother was not acting pursuant to the Uniform Parentage Act when she filed the bastardy complaint in 1941, neither that legislation nor the Probate Code provision should be construed to ignore the force and effect of the judgment she obtained. That Griswold's mother brought her action to determine paternity long before the adoption of the Uniform Parentage Act, and that all procedural requirements of an action under Family Code section 7630 may not have been followed, should not detract from its binding effect in this probate proceeding where the issue adjudicated was identical with the issue that would have been presented in a Uniform Parentage Act action. (See *Weir*, *supra*, 59 Cal.App.4th at p. 1521.) Moreover, a prior adjudication of paternity does not compromise a state's interests in the accurate and efficient disposition of property at death. (See *Trimble v. Gordon* (1977) 430 U.S. 762, 772 & fn. 14 [97 S.Ct. 1459, 1466, 52 L.Ed.2d 31] [striking down a provision of a state probate act that precluded a category of illegitimate children from participating in their intestate fathers' estates where the parent-child relationship had been established in state court paternity actions prior to the fathers' deaths].)

In sum, we find that the 1941 Ohio judgment was a court order "entered during the father's lifetime declaring paternity" (§ 6453, subd. (b)(1)), and that it establishes Draves as the natural parent of Griswold for purposes of intestate succession under section 6452.

Disposition

(7) " 'Succession to estates is purely a matter of statutory regulation, which cannot be changed by the courts.' " (*Estate of De Cigaran*, *supra*, 150 Cal. at p. 688.) We do not disagree that a natural parent who does no more than openly acknowledge a child in court and pay court-ordered child support may not reflect a particularly worthy predicate for inheritance by that parent's issue, but section 6452 provides in unmistakable language that it shall be so. While the Legislature remains free to reconsider the matter and may choose to change the rules of succession at any time, this court will not do so under the pretense of interpretation.

The judgment of the Court of Appeal is affirmed.

George, C. J., Kennard, J., Werdegar, J., and Chin, J., concurred. ***925**

BROWN, J.

I reluctantly concur. The relevant case law strongly suggests that a father who admits paternity in court with no subsequent disclaimers "acknowledge[s] the child" within the meaning of subdivision (a) of Probate Code section 6452. Moreover, neither the statutory language nor the legislative history supports an alternative interpretation. Accordingly, we must affirm the judgment of the Court of Appeal.

Nonetheless, I believe our holding today contravenes the overarching purpose behind our laws of intestate succession-to carry out "the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep. (1982) p. 2319.) I doubt most children born out of wedlock would have wanted to bequeath a share of their estate to a "father" who never contacted them, never mentioned their existence to his family and friends, and only paid court-ordered child support. I doubt even more that these children would have wanted to bequeath a share of their estate to that father's other offspring. Finally, I have *no* doubt that most, if not all, children born out of wedlock would have balked at bequeathing a share of their estate to a "forensic genealogist."

To avoid such a dubious outcome in the future, I believe our laws of intestate succession should allow a parent to inherit from a child born out of wedlock only if the parent has some sort of parental connection to that child. For example, requiring a

parent to treat a child born out of wedlock as the parent's own before the parent may inherit from that child would prevent today's outcome. (See, e.g., *Bullock v. Thomas* (Miss. 1995) 659 So.2d 574, 577 [a father must "openly treat" a child born out of wedlock "as his own " in order to inherit from that child].) More importantly, such a requirement would comport with the stated purpose behind our laws of succession because that child likely would have wanted to give a share of his estate to a parent that treated him as the parent's own.

Of course, this court may not remedy this apparent defect in our intestate succession statutes. Only the Legislature may make the appropriate revisions. I urge it to do so here. ***926**

Cal. 2001.

Estate of DENIS H. GRISWOLD, Deceased. NORMA B. DONER-GRISWOLD, Petitioner and Respondent, v. FRANCIS V. SEE, Objector and Appellant.

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GREGORY EVANGELATOS, Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; VAN WATERS & ROGERS,
INC., et al., Real Parties in Interest.
VAN WATERS & ROGERS, INC., Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; GREGORY EVANGELATOS et
al., Real Parties in Interest
No. S000194.

Supreme Court of California

Apr 21, 1988.

SUMMARY

A high school student who was injured while attempting to make fireworks at home with chemicals purchased in a retail store brought an action for personal injuries against the retailer and the wholesale distributor of the chemicals. Before trial began, Proposition 51 (limiting an individual joint tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault; Civ. Code, § 1431 et seq.) was enacted, and the student and both defendants filed motions seeking a determination whether the proposition would be applied to the case. The trial court found that Proposition 51 was constitutional and that it applied to all cases that had not gone to trial prior to its effective date. The student and one of the defendants filed separate mandate petitions challenging the trial court's decision. The Court of Appeal, Second Dist., Div. Two, Nos. B021968, B022000, concluded that the trial court had correctly ruled as to the validity and retroactive application of the proposition.

The Supreme Court affirmed the decision of the Court of Appeal insofar as it upheld the constitutionality of Proposition 51, but reversed as to the retroactivity finding. The court held that Proposition 51 was not unconstitutionally vague and that it did not violate equal protection guarantees. However, the court held, the proposition could not be applied to the student's action. Under Civ. Code, § 3 (no provision of the code is retroactive unless expressly so declared), and the general principle of prospectivity, the absence of any express provision directing retroactive application strongly supported prospective operation of the measure. Further, there was nothing in the statutory "findings and declaration of purpose" or the brochure materials to suggest that retroactivity was even considered during the ***1189** enactment process; and retroactive application could have unexpected and potentially unfair consequences for all parties who acted in reliance on the then existing state of the law. (Opinion by Arguelles, J., with Mosk, Acting C. J., Broussard and Panelli, JJ. concurring. Separate concurring and dissenting opinion by Kaufman, J., with Eagleson, J., and Anderson (Carl W.), J., [FN*] concurring.)

FN* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Acting Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Torts § 9--Persons Liable--Joint and Several Tortfeasors--Statutory Limitation of Liability for Noneconomic Damages-- Vagueness.
Proposition 51 (Civ. Code, § 1431 et seq.), which modified the traditional common law joint and several liability doctrine by limiting an individual tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault, is not unconstitutionally vague. Although language of the proposition may not provide a certain answer for every possible situation in which the modified joint and several liability doctrine may come into play, application of the statute in many instances will be quite clear. Application of the statute in ambiguous situations can be resolved by trial and appellate courts in time-honored, case-by-case fashion by reference to the language and purposes of the statutory scheme as a whole.

(2) Constitutional Law § 113--Substantive Due Process--Statutory Vagueness and Overbreadth.
So long as a statute does not threaten to infringe on exercise of rights under U.S. Const., 1st Amend., or other constitutional rights, ambiguities, even if numerous, do not justify the invalidation of the

statute on its face. In order to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct, a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that the law is impermissibly vague in all of its applications.

(3) Statutes § 19--Construction--Initiatives.
The judiciary's traditional role of interpreting ambiguous statutory language or filling in the gaps of statutory schemes is as applicable to initiative measures as it is to measures adopted by the Legislature. ***1190**

(4) Constitutional Law § 83--Equal Protection--Classification--Judicial Review--Tort Reform Proposition.
On appeal of a judgment upholding the validity of Proposition 51 (limiting an individual joint tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault; Civ. Code, § 1431 et seq.), the traditional "rational relationship" standard, and not the more stringent "strict scrutiny" standard, was applicable in determining whether the proposition violated equal protection guarantees due to allegedly impermissible distinctions between economic and noneconomic damages and between plaintiffs injured by solvent tortfeasors and those injured by insolvent ones.

(5) Torts § 9--Persons Liable--Joint and Several Tortfeasors--Limitation of Liability for Noneconomic Damages--Equal Protection.
Proposition 51 (limiting an individual joint tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault; Civ. Code, § 1431 et seq.) does not violate equal protection guarantees. There is no constitutional impediment to differential treatment of economic and noneconomic losses, and the proposition reflects no intent to discriminate between injured victims on the basis of the solvency of the tortfeasors by whom they are injured. The doctrine of joint and several liability is not a constitutionally mandated rule of law immune from legislative modification or revision; rather, the allocation of tort damages among multiple tortfeasors is an entirely appropriate subject for legislative resolution.

(6a, 6b, 6c, 6d, 6e, 6f) Torts § 9--Persons Liable--Joint and Several Tortfeasors--Limitation of Liability for Noneconomic Damages-- Retroactive Application.
In a personal injury action, the trial court erred in holding that Proposition 51 (limiting an individual joint tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault; Civ. Code, § 1431 et seq.) should constitutionally be applied to cases tried after its effective date, where the cause of action arose before the effective date of the proposition. Under Civ. Code, § 3 (no provision of the code is retroactive unless expressly so declared), and the general principle of prospectivity, the absence of any express provision directing retroactive application strongly supported prospective operation of the measure. Further, there was nothing in the legislative history to suggest that retroactivity was even considered during the enactment process; and retroactive application could have unfair consequences for all parties who acted in reliance on the then existing state of the law.

(7) Statutes § 5--Operation and Effect--Retroactivity--Tort Reform Statute.
The application of a tort reform statute to a cause of action ***1191** that arose prior to the effective date of the statute but that is tried after the effective date constitutes retroactive application of the statute.

(8) Statutes § 5--Operation and Effect--Retroactivity--Presumption as to Prospectivity.
Legislation must be considered as addressed to the future, not to the past. A retroactive operation will not be given to a statute that interferes with antecedent rights unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the Legislature. [Disapproving *Andrus v. Municipal Court* (1983) 143 Cal.App.3d 1041 [192 Cal.Rptr. 341], insofar as that case suggests that where one provision of a code states that other provisions of the code are not retroactive unless expressly so declared, that provision has no application to amendments to the code and applies only to the original provisions of the code.]

[See **Cal.Jur.3d,** Statutes, § 23; **Am.Jur.2d,** Statutes, § 3533.]

(9) Statutes § 5--Operation and Effect--Effect of No Express Provision as to Retroactivity.
Even when a statute does not contain an express provision mandating retroactive application, the legislative history or the context of enactment may provide a sufficiently clear indication that the Legislature intended the statute to operate retrospectively that it may be found appropriate to accord the statute retroactive application.

(10) Statutes § 19--Construction--Initiatives.
Initiative measures are subject to the ordinary rules and canons of statutory construction.

(11) Statutes § 5--Operation and Effect--Retroactivity--Presumption as to Prospectivity.
The presumption of prospectivity of a legislative enactment assures that reasonable reliance on current legal principles will not be defeated in the absence of a clear indication of a legislative intent to override such reliance.

(12) Statutes § 5--Operation and Effect--Retroactivity--Presumption as to Prospectivity--Effect of Cases Concerning Measure of Damages for Conversion.
The line of cases applying statutory amendments that modify the legal measure of damages recoverable in an action for wrongful conversion of personal or real property to all trials conducted after the effective date of the revised statute cannot properly be interpreted as displacing ordinary principles of statutory interpretation with regard to the question of retroactivity. ***1192**

COUNSEL

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ARGUELLES, J.

In June 1986, the voters of California approved an initiative measure, the Fair Responsibility Act of 1986 (Civ. Code, § § 1431 to 1431.5) - popularly known as, and hereafter referred to, as Proposition 51 - which modified the traditional, common law "joint and several liability" doctrine, limiting an individual tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault. [FN1] Just a few weeks after the election, the underlying ***1193** personal injury action in this case - which arose out of a July 1980 accident and which had been pending for nearly five years prior to the June 1986 election - was assigned for trial. Before the trial began, the parties requested the trial court to determine, inter alia, whether the newly revised joint and several liability doctrine would apply to this case. Plaintiff contended that the new legislation should not be applied for a number of reasons, maintaining (1) that Proposition 51 is unconstitutional on its face, and (2) that, in any event, the measure does not apply retroactively to causes of action which accrued prior to its effective date. [FN2] Defendants contested both arguments.

> FN1 The complete text of Proposition 51 and all relevant portions of the election pamphlet, including the Legislative Analyst's analysis and the arguments of the proponents and opponents, are set forth in an appendix to this opinion.
>
> FN2 Under article II, section 10, subdivision (a) of the California Constitution, the measure went into effect on June 4, 1986, the day after the election.

The trial court concluded (1) that Proposition 51 is constitutional on its face and (2) that it should be applied to all cases coming to trial after its effective date, including this case, regardless of when the cause of action accrued. Reviewing the trial court's ruling in these consolidated pretrial writ proceedings, the Court of Appeal upheld the trial court's determination in all respects, declining - with respect

to the retroactivity issue - to follow another recent Court of Appeal decision, *Russell* v. *Superior Court* (1986) 185 Cal.App.3d 810 [230 Cal.Rptr. 102], which had concluded that Proposition 51 does not apply retroactivity to causes of action which arose prior to the initiative's effective date. Because of the importance of the issues and the conflict in Court of Appeal decisions on the retroactivity question, we granted review.

As we shall explain, we have concluded that the Court of Appeal judgment should be affirmed in part and reversed in part. On the constitutional question, we agree with the Court of Appeal that plaintiff's facial constitutional challenge to Proposition 51 is untenable. Past decisions of this court make it quite clear that the initiative measure - in modifying the common law rule governing the potential liability of multiple tortfeasors - violates neither the due process nor equal protection guaranties of the state or federal Constitution. Although the proposition's language leaves a number of issues of interpretation and application to be decided in future cases, those unsettled questions provide no justification for striking down the measure on its face.

On the question of retroactivity, we conclude that the Court of Appeal erred in ruling that Proposition 51 applies to causes of action which accrued before the measure's effective date. It is a widely recognized legal principle, specifically embodied in section 3 of the Civil Code, that in the absence of a clear legislative intent to the contrary statutory enactments apply ***1194** prospectively. The drafters of the initiative measure in question, although presumably aware of this familiar legal precept, did not include any language in the initiative indicating that the measure was to apply retroactively to causes of action that had already accrued and there is nothing to suggest that the electorate considered the issue of retroactivity at all. Although defendants argue that we should nonetheless infer a legislative intent on the part of the electorate to apply the measure retroactively from the general purpose and context of the enactment, the overwhelming majority of prior judicial decisions - both in California and throughout the country - which have considered whether similar tort reform legislation should apply prospectively or retroactively when the statute is silent on the point have concluded that the statute applies prospectively. Reflecting the common-sense notion that it may be unfair to change "the rules of the game" in the middle of a contest, these authorities persuasively demonstrate that the general legal presumption of prospectivity applies with full force to a measure, like the initiative at issue here, which substantially modifies a legal doctrine on which many persons may have reasonably relied in conducting their legal affairs prior to the new enactment.

Contrary to the extravagant rhetoric of the dissenting opinion, our conclusion that Proposition 51 must properly be interpreted to apply prospectively does not postpone or delay the operative effect of Proposition 51 and is in no way inconsistent with the fact that the measure was adopted in response to a liability crisis. As we explain, the new legal doctrine established by Proposition 51 went into effect the day following the passage of the initiative and could immediately be relied on by insurance companies to reduce insurance premiums and by potential tort defendants to resume activities they may have curtailed because of the preexisting joint and several liability rule. Indeed, although the dissenting opinion vigorously asserts that Proposition 51's relationship to a liability crisis proves that the electorate must have intended that the measure would be applied retroactively, that assertion is clearly belied by the numerous recent tort reform statutes, adopted in other states in response to the same liability crisis, which, by their terms, are expressly prospective in operation. (See post, pp. 1219-1220.) As these statutes demonstrate, a prospective application of Proposition 51 is totally compatible with the history and purpose of the initiative measure.

I.

In July 1980, plaintiff Gregory Evangelatos, an 18-year-old high school student, was seriously injured in his home, apparently while attempting to make fireworks with chemicals purchased from a retail store. In July 1981, plaintiff filed an action for damages against the retailer (Student Science ***1195** Store, Inc.), the wholesale distributor (Van Waters & Rogers, Inc.), and four manufacturers of the chemicals he was using, alleging that defendants were liable for his injuries on both negligence and strict liability theories. The causes of action against three of the manufacturers were dismissed on summary judgment and plaintiff voluntarily dismissed the action against the fourth manufacturer. The case proceeded against the retailer and the wholesale distributor of the chemicals.

On June 23, 1986, almost five years after the action had been filed, the case was assigned for trial. Before the trial began, plaintiff and the two remaining defendants filed motions with the trial court seeking a determination whether Proposition 51, which had been approved by the voters just three weeks earlier

at the June 3, 1986, election, would be applied in this case. The motions sought a determination of the constitutional validity of the proposition and, if valid, a resolution of various questions relating to the applicability and proper interpretation of the measure.

After briefing, the trial court issued a lengthy written statement, ruling on five separate issues. The court concluded (1) that Proposition 51 was validly enacted and is not unconstitutional on its face; (2) that the measure applies to all cases, including the present proceeding, which had not gone to trial before June 4, 1986, the date on which the initiative measure became effective, regardless of when the cause of action arose; (3) that in determining each defendant's "several" liability for a portion of plaintiff's noneconomic damages under the proposition, the trier of fact may consider the conduct of all persons whose fault contributed to plaintiff's injury, not just the conduct of plaintiff and defendants who are parties to the action; (4) that future medical expenses and loss of future earnings are "economic damages" within the meaning of Proposition 51 for which defendants remain jointly and severally liable; and (5) that for purposes of apportioning fault in this case, the summary judgment that had been entered in favor of three manufacturers constituted a determination that no causative fault could properly be attributed to them.

Immediately following the ruling, plaintiff and one of the defendants (Van Waters & Rogers, Inc.) filed separate mandate petitions in the Court of Appeal, challenging different aspects of the trial court's decision. The Court of Appeal initially denied both petitions summarily, and the parties then sought review in this court. Shortly before the petitions reached us, another Court of Appeal rendered its decision in *Russell* v. *Superior Court, supra,* 185 Cal.App.3d 810, holding Proposition 51 inapplicable to all causes of action which accrued before the measure's effective date. On October 29, 1986, our court denied a petition for review in *Russell* and transferred the two petitions in this matter to the Court of Appeal with ***1196** directions to issue alternative writs. Our order directed the Court of Appeal's attention to the *Russell* decision.

On remand, the Court of Appeal issued alternative writs, consolidated the matters for briefing and argument, and ultimately concluded that the trial court had correctly resolved all of the questions at issue, including the facial constitutionality of the measure and its applicability to the instant case. Although the Court of Appeal recognized that the *Russell* court had reached a contrary conclusion on the retroactivity issue, it disagreed with the *Russell* decision, concluding that, while the initiative measure contained no express or affirmative indication that the measure was intended to apply retroactively, in its view "the legislative intent was for the statute to take effect immediately and to apply to as many cases as feasible." Finding that it would be unduly disruptive to require retrial of all tort cases that had been tried before the enactment of Proposition 51 but in which judgments had not yet become final, the Court of Appeal concluded that "[t]he maximum feasible application of the Act is to all cases yet to be tried, including this one."

Both plaintiff and defendant petitioned for review, and we granted review to resolve the important questions presented by the case.

II.

Before analyzing either the constitutional or retroactivity issues, we believe it may be useful to place Proposition 51's modification of the common law joint and several liability doctrine in brief historical perspective.

Prior to the adoption of comparative negligence principles in California in the mid-1970's, the jury, in assessing liability or awarding damages in an ordinary tort action, generally did not determine the relative degree or proportion of fault attributable either to the plaintiff, to an individual defendant or defendants, or to any nonparties to the action. Under the then-prevailing tort doctrines, the absence of any inquiry into relative culpability had potentially harsh consequences for both plaintiffs and defendants. On the one hand, if a plaintiff was found to be at all negligent, no matter how slight, under the contributory negligence rule he was generally precluded from obtaining any recovery whatsoever. (See generally 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 683, p. 2968 and authorities cited.) On the other hand, if a defendant was found to be at all negligent, regardless of how minimally, under the joint and several liability rule he could be held responsible for the full damages sustained by the plaintiff, even if other concurrent tortfeasors had also been partially, or even primarily, responsible for the injury. (See *id.*, § 35, pp. 2333-2334.) Moreover, the governing ***1197** rules at that time gave the plaintiff unilateral authority to decide which defendant or defendants were to be sued (see *id.*, § 37, p. 2335); a defendant who had been singled out for suit by the plaintiff generally had no right to bring other tortfeasors into the action, even if the other

tortfeasors were equally or more responsible for the plaintiff's injury (see *id*., § 46, p. 2346). [FN3]

> FN3 The Contribution Act of 1957 (Code Civ. Proc., § § 875-880) ameliorated the situation somewhat by permitting a pro rata division of damages when the plaintiff sued more than one defendant and a joint judgment was entered against the defendants. That act only applied, however, in instances in which a judgment had been entered against multiple defendants, and, if a plaintiff chose not to join a principally culpable tortfeasor in the action, the defendant or defendants who had been singled out for suit had no right to contribution.

In *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393], this court took an initial step in modifying this traditional common law structure, ameliorating the hardship to the plaintiff by abrogating the all-or-nothing contributory negligence doctrine and adopting in its place a rule of comparative negligence. *Li* held that "the contributory negligence of the person injured ... shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering." (13 Cal.3d at p. 829.)

In *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578 [146 Cal.Rptr. 182, 578 P.2d 899], our court took the next step in modifying the traditional structure, this time altering the preexisting common law doctrines to diminish the hardship to defendants. Although the *American Motorcycle* court concluded that the traditional common law joint and several liablity doctrine should be retained - relying, in part, on the fact that at that time the "overwhelming majority" of jurisdictions that had adopted comparative negligence had also retained the joint and several liability rule (20 Cal.3d at p. 590) - at the same time the *American Motorcycle* court held (1) that plaintiffs should no longer have the unilateral right to determine which defendant or defendants should be included in an action and that defendants who were sued could bring other tortfeasors who were allegedly responsible for the plaintiff's injury into the action through cross-complaints (20 Cal.3d at pp. 604-607), and (2) that any defendant could obtain equitable indemnity, on a comparative fault basis, from other defendants, thus permitting a fair apportionment of damages among tortfeasors. (See 20 Cal.3d at pp. 591-598.)

Subsequent cases established that under the principles articulated in *American Motorcycle, supra*, 20 Cal.3d 578, a defendant may pursue a comparative equitable indemnity claim against other tortfeasors either (1) by filing a cross-complaint in the original tort action or (2) by filing a separate indemnity action after paying more than its proportionate share of ***1198** the damages through the satisfaction of a judgment or through a payment in settlement. (See, e.g., *Sears, Roebuck & Co. v. International Harvester Co.* (1978) 82 Cal.App.3d 492, 496 [147 Cal.Rptr. 262]; *American Bankers Ins. Co. v. Avco-Lycoming Division* (1979) 97 Cal.App.3d 732, 736 [159 Cal.Rptr. 70].) In addition, more recent decisions also make clear that if one or more tortfeasors prove to be insolvent and are not able to bear their fair share of the loss, the shortfall created by such insolvency should be apportioned equitably among the remaining culpable parties - both defendants and plaintiffs. (See, e.g., *Paradise Valley Hospital v. Schlossman* (1983) 143 Cal.App.3d 87 [191 Cal.Rptr. 531]; *Ambriz v. Kress* (1983) 148 Cal.App.3d 963 [196 Cal.Rptr. 417].)

Although these various developments served to reduce much of the harshness of the original all-or-nothing common law rules, the retention of the common law joint and several liablity doctrine produced some situations in which defendants who bore only a small share of fault for an accident could be left with the obligation to pay all or a large share of the plaintiff's damages if other more culpable tortfeasors were insolvent.

The initiative measure in question in this case was addressed to this remaining issue. While recognizing the potential inequity in a rule which would require an injured plaintiff who may have sustained considerable medical expenses and other damages as a result of an accident to bear the full brunt of the loss if one of a number of tortfeasors should prove insolvent, the drafters of the initiative at the same time concluded that it was unfair in such a situation to require a tortfeasor who might only be minimally culpable to bear all of the plaintiff's damages. As a result, the drafters crafted a compromise solution: Proposition 51 retains the traditional joint and several liability doctrine with respect to a plaintiff's *economic* damages, but adopts a rule of several liability for *noneconomic* damages, providing that each defendant is liable for only that portion of the plaintiff's noneconomic damages which is commensurate with that defendant's degree of fault for the injury. [FN4] It was this compromise measure - which drew

heavily ***1199** upon a number of bills which had been passed by the Senate but not by the Assembly in a number of preceding legislative sessions (see Sen. Bill No. 75 (1985-1986 Reg. Sess.); Sen. Bill No. 575 (1983-1984 Reg. Sess.); Sen. Bill No. 500 (1981-1982 Reg. Sess.)) - that was adopted by the electorate in the June 1986 election.

> FN4 Civil Code section 1431.2, which constitutes the heart of Proposition 51, provides in full: "(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount. [¶] (b) (1) For purposes of this section, the term 'economic damages' means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities. [¶] (2) For the purposes of this section, the term 'non-economic damages' means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation."

Although Proposition 51 is the first legislative modification of the joint and several liability doctrine to be enacted in California, in recent years analogous statutory alterations of the traditional common law joint and several liablity rule have been adopted by many states throughout the country, often as part of a comprehensive legislative implementation of comparative fault principles. The revisions of the joint and several liability doctrine in other jurisdictions have taken a variety of forms: several states have abolished joint and several liability entirely and replaced it with a "pure" several liability rule, [FN5] other states have formulated various guidelines to distinguish between more culpable and less culpable tortfeasors and have adopted several liability only for the less culpable tortfeasors, [FN6] and still others, like California, have distinguished between different categories of damages sustained in an injury, retaining some form of joint and several liability for "economic" or "medically related" damages, while adopting some form of several liability for "pain and suffering" and other noneconomic damages. [FN7] Thus, while Proposition 51 unquestionably made a ***1200** substantial change in this state's traditional tort doctrine, when viewed from a national perspective it becomes apparent that the measure's modification of the common law joint and several liability rule was not an isolated or aberrant phenomenon but rather paralleled similar developments in the evolution and implementation of the comparative-fault principle in other states.

> FN5 At least five states apply a "pure" several liability rule. (See, e.g., Kan.Stat.Ann. § 60-258a(d) (1983); Vt.Stat.Ann. tit. 12, § 1036 (Supp. 1987); Ohio Rev.Code Ann. § 2315.19 (Page 1981); Utah Code Ann. § § 78-27-38, 78-27-40 (1987); Colo.Rev.Stat. § 13-21-111.5 (1987). See also Wash.Rev. Code Ann. § 4.22.070 (West Supp. 1987) [adopting several liability as a general rule, but retaining joint and several liability in several, specified areas]; Nev.Rev.Stat.Ann. § 41.141 (Supp. 1987) [same].)
>
> FN6 At least four states have adopted such an approach. (See, e.g., Iowa Code Ann. § 668.4 (West 1987) [joint and several liability does not apply to defendants who bear less that 50 percent of fault]; Minn.Stat.Ann. § 604.02(1) (West Supp. 1988) [if state or municipal defendant's fault is less than 35 percent, "it is jointly and severally liable for an amount no greater than twice the amount of fault"]; Mo.Ann.Stat. § 538.230 (Vernon Supp. 1987) [in medical malpractice cases "any defendant against whom an award of damages is made shall be jointly liable only with those defendants whose apportioned percentage of fault is equal to or less than such defendant"]; Tex.Civ.Prac. & Rem. Code Ann. § 33.013 (Vernon 1988) [defendant severally liable unless percentage of fault is greater than 20 percent, or, in specified actions, defendant's fault is greater than plaintiff's].)
>
> FN7 At least four states, in addition to

California, have embraced such a rule. (See, e.g., N.Y. Civ.Prac.L. & R. § 1601 (McKinney Supp. 1987) [when defendant's liability is less than 50 percent, defendant's liability for plaintiff's noneconomic loss shall not exceed that of defendant's equitable share; numerous categories of cases excepted]; Fla.Stat.Ann. § 768.81(3) (West Supp. 1987) [joint and several liability abolished, except where a defendant's percentage of fault equals or exceeds that of a particular claimant, the defendant is jointly and severally liable for the claimant's economic damage]; Ore.Rev.Stat. § 18.485 (1983) [defendants severally liable for noneconomic damages, and jointly and severally liable for economic damages unless defendant is less at fault than plaintiff or less than 15 percent at fault in which case defendant only severally liable for economic damages]; Ill.Ann.Stat. ch. 110, paras. 2-1117, 2-1118 (Smith-Hurd Supp. 1987) [all defendants jointly and severally liable for medical expenses, defendants who are less than 25 percent at fault severally liable for all other damages, defendants who are more than 25 percent at fault jointly and severally liable for all other damages].)

Having briefly reviewed the historical background of Proposition 51, we turn initially to plaintiff's broad claim that the Court of Appeal erred in failing to strike down the initiative measure as unconstitutional on its face.

III.

Plaintiff contends that Proposition 51 is facially unconstitutional on two separate grounds, asserting (1) that the measure is "too vague and ambiguous" to satisfy the due process requirements of either the state or federal Constitutions, and (2) that the enactment violates both the state and federal equal protection clauses by establishing classifications that are not rationally related to a legitimate state interest. As we shall see, both of these constitutional claims are similar to contentions raised just a few years ago in a series of cases challenging the validity of a variety of provisions of another legislative tort reform measure, the Medical Injury Compensation Reform Act of 1975 (MICRA) (Stats. 1975, 2d Ex. Sess. 1975-1976, chs. 1, 2, pp. 3949- 4007), an enactment which modified a number of common law tort doctrines in the medical malpractice area. Our decisions in the earlier MICRA cases clearly establish that plaintiff's current constitutional challenges lack merit.

A.

(1a) Plaintiff initially contends that Proposition 51 is unconstitutionally vague. Relying on the United States Supreme Court's classic statement of the vagueness doctrine in *Connally* v. *General Const. Co*. (1926) 269 U.S. 385, 391 [70 L.Ed. 322, 328, 46 S.Ct. 126] - "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law" - plaintiff maintains that Proposition 51 is subject to just such a criticism. To support his ***1201** contention, plaintiff catalogues a series of questions relating to the application of Proposition 51 to which he suggests the language of the measure provides no clear answer. [FN8] He asserts that the existence of these numerous unanswered questions renders the measure unconstitutionally vague on its face and warrants the invalidation of the enactment in its entirety.

FN8 Plaintiff's petition for review lists the following allegedly unanswered questions as to the proposition's application:
"1. Does it retroactively apply to this case?
"2. Does it apply if the jury finds Gregory 0% at fault?
"3. Does it apply if the jury finds Van Waters & Rodgers liable based on strict products liability?
"4. [Does it] apply if the jury finds Student Science acted *intentionally*?
"5. If the jury finds Gregory more than 0% at fault how is his recovery adjusted?
"6. Who bears the burden of naming and serving other parties?
"7. Can the special verdict form contain a catch-all 'other' box or must such parties or non-parties be specified and limited to the evidence adduced at trial?"

Plaintiff's contention is plainly flawed. Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear. (2) So long as a statute does not threaten to infringe on the exercise of First Amendment or other constitutional rights, however, such ambiguities, even if numerous, do not justify the invalidation of a statute on its face. In order to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct - like the initiative measure at issue here - a party must

do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that "the law is impermissibly vague *in all of its applications*." (Italics added.) (*Hoffman Estates* v. *Flipside, Hoffman Estates* (1982) 455 U.S. 489, 497 [71 L.Ed.2d 362, 371, 102 S.Ct. 1186].) Plaintiff clearly has not satisfied this burden.

Plaintiff's vagueness claim echoes a similar constitutional argument that was raised in *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 377-378 [204 Cal.Rptr. 671, 683 P.2d 670, 41 A.L.R.4th 233], with respect to section 667.7 of the Code of Civil Procedure, a section of MICRA which provided for the periodic payment of judgments in medical malpractice cases under certain circumstances. In *American Bank*, plaintiff claimed, inter alia, that the statutory provision mandating periodic payment "should ... be struck down as unconstitutionally 'void for vagueness, ambiguity and unworkability,' because it leaves unanswered many questions as to how a trial court is to actually formulate a comprehensive payment schedule without the benefit of very detailed special jury verdicts." (36 Cal.3d at p. 377.) After noting that the practical problems of application ***1202** were by no means insurmountable, we went on to point out that "[i]n any event, plaintiff provides no authority to support its claim that the remaining uncertainties which may inhere in the statute provide a proper basis for striking it down on its face. As with other innovative procedures and doctrines - for example, comparative negligence - in the first instance trial courts will deal with novel problems that arise in time-honored case-by-case fashion, and appellate courts will remain available to aid in the familiar common law task of filling in the gaps in the statutory scheme. [Citation.]" (*Id*. at p. 378.)

Precisely the same reasoning applies in this case. (1b) Although the language of Proposition 51 may not provide a certain answer for every possible situation in which the modified joint and several liability doctrine may come into play, the application of the statute in many instances will be quite clear. Thus, for example, while plaintiff cites the statute's lack of clarity on the retroactivity issue, there is no question but that the statute applies to causes of action accruing after its effective date; similarly, although plaintiff complains that the statute is not clear as to whether it applies to causes of action based on intentional tortious conduct or how it should be applied with respect to cases involving absent tortfeasors, the statute's application in an ordinary multiple tortfeasor comparative negligence action in which all tortfeasors are joined is not in doubt. Further, as stated in *American Bank, supra*, 36 Cal.3d 359, when situations in which the statutory language is ambiguous arise, the statute's application can be resolved by trial and appellate courts "in time-honored, case-by-case fashion," by reference to the language and purposes of the statutory schemes as a whole. (3) The judiciary's traditional role of interpreting ambigious statutory language or "filling in the gaps" of statutory schemes is, of course, as applicable to initiative measures as it is to measures adopted by the Legislature. (See, e.g., *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 244-246 [149 Cal.Rptr. 239, 583 P.2d 1281].) (1c) Accordingly, there is no merit to plaintiff's claim that the statute should be struck down as unconstitutionally vague on its face.

B.

(4)**(See fn. 9.)** , (5) Plaintiff alternatively contends that Proposition 51 violates the state and federal equal protection guaranties, allegedly because the classifications drawn by the statute are not rationally related to a legitimate state interest. [FN9] Plaintiff claims in particular that the statute is ***1203** invalid under the equal protection clause (1) because it discriminates between the class of injured persons who suffer economic damage and the class of injured persons who suffer noneconomic damage providing full protection for those who suffer economic damage but a lesser protection for those who suffer noneconomic damage, and (2) because it improperly discriminates within the class of victims who suffer noneconomic damage, permitting full recovery for victims who are injured by solvent tortfeasors, but providing only partial recovery to victims injured by insolvent tortfeasors. Both claims are clearly without merit.

> FN9 Although plaintiff also suggests that the proposition's classifications should be evaluated under a more stringent, "strict scrutiny" standard, the controlling decisions make it clear that the traditional "rational relationship" equal protection standard is applicable here. (See, e.g., *American Bank & Trust Co., supra*, 36 Cal.3d 359, 373, fn. 12; *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 161-164 [211 Cal.Rptr. 368, 695 P.2d 665].)

Plaintiff's challenge to the proposition's disparate treatment of economic and noneconomic damages

parallels a similar equal protection attack that was directed at Civil Code section 3333.2, a provision of MICRA which placed a $250,000 limit on the noneconomic damages which may be recovered in a medical malpractice action, but which placed no similar limit on economic damages. In rejecting that equal protection challenge in *Fein v. Permanente Medical Group, supra*, 38 Cal.3d 137, we explained that there is clearly a rational basis for distinguishing between economic and noneconomic damages and providing fuller protection for economic losses, [FN10] and observed that "[t]he equal protection clause certainly does not require the Legislature to limit a victim's recovery for out-of-pocket medical expenses or lost earnings simply because it has found it appropriate to place some limit on damages for pain and suffering and similar noneconomic losses." (38 Cal.3d at p. 162.) In similar fashion, the equal protection clause clearly does not require a state to modify the traditional joint and several liability rule as it applies to economic damages, simply because the state has found it appropriate to limit an individual tortfeasor's potential liability for an injured person's noneconomic damages. Indeed, the distinction which Proposition 51 draws between economic and noneconomic damages is, in general terms, less severe than the statutory distinction upheld in *Fein*; Proposition 51 places no dollar limit on the noneconomic damages a plaintiff may properly recover, but simply provides that each individual tortfeasor will be liable only for that share of the plaintiff's noneconomic damages which is ***1204** commensurate with the tortfeasor's comparative fault. There is no constitutional impediment to such differential treatment of economic and noneconomic losses.

> FN10 In *Fein*, the court pointed out that legal commentators had long questioned whether sound public policy supported the comparable treatment of economic and noneconomic damages, explaining that "[t]houghtful jurists and legal scholars have for some time raised serious questions as to the wisdom of awarding damages for pain and suffering in any negligence case, noting, inter alia, the inherent difficulties in placing a monetary value on such losses, the fact that money damages are at best only imperfect compensation for such intangible injuries and that such damages are generally passed on to, and borne by, innocent consumers. While the general propriety of such damages is, of course, firmly imbedded in our common law jurisprudence [citation], no California case of which we are aware has ever suggested that the right to recover for such noneconomic injuries is constitutionally immune from legislative limitation or revision." (Footnote omitted.) (38 Cal.3d at pp. 159-160.)

Nor is Proposition 51 vulnerable to constitutional attack on the basis of plaintiff's claim that it improperly discriminates within the class of plaintiffs who have suffered noneconomic harm. Plaintiff asserts that the statute draws an arbitrary distinction between persons with noneconomic damages who have been injured by solvent tortfeasors and those who have been injured by insolvent defendants, permitting full recovery of noneconomic damages by the former class but only partial recovery by the latter class. The terms of the proposition itself, however, reflect no legislative intent to discriminate between injured victims on the basis of the solvency of the tortfeasors by whom they are injured; instead, the measure quite clearly is simply intended to limit the potential liability of an individual defendant for noneconomic damages to a proportion commensurate with that defendant's personal share of fault.

Although one consequence of the statute's adoption of several liability for noneconomic damages will be that persons who are unfortunate enough to be injured by an insolvent tortfeasor will not be able to obtain full recovery for their noneconomic losses, that consequence does not render the provision unconstitutional. Under any tort liability scheme, a plaintiff who is injured by a single tortfeasor who proves to be insolvent is, of course, worse off than a plaintiff who is injured by a single tortfeasor who can pay an adverse judgment. Such "differential treatment" flowing from the relative solvency of the tortfeasor who causes an injury, however, has never been thought to render all tort statutes unconstitutional or to require the state to compensate plaintiffs for uncollectible judgments obtained against insolvent defendants. And while the common law joint and several liability doctrine has in the past provided plaintiffs a measure of protection from the insolvency of a tortfeasor when there are additional tortfeasors who are financially able to bear the total damages, plaintiff has cited no case which suggests that the joint and several liability doctrine is a constitutionally mandated rule of law, immune from legislative modification or revision. As with other common law tort doctrines - like the doctrines at issue in the recent line of MICRA decisions (see, e.g., *American Bank & Trust Co.* v. *Community Hospital, supra*, 36 Cal.3d 359, 366-374 [modification of

common law doctrine providing for payment of judgment in lump sum]; *Barme v. Wood* (1984) 37 Cal.3d 174 [207 Cal.Rptr. 816, 689 P.2d 446] [modification of collateral source rule]; *Fein v. Permanente Medical Group, supra*, 38 Cal.3d 137 [limitation of noneconomic damages]) - the allocation of tort damages among multiple tortfeasors is an entirely appropriate subject for legislative resolution. In this regard, it is worth recalling that Proposition ***1205** 51 does not require the injured plaintiff to bear the entire risk of a potential tortfeasor's insolvency; solvent defendants continue to share fully in such risk with respect to a plaintiff's economic damages.

In sum, although reasonable persons may disagree as to the wisdom of Proposition 51's modification of the common law joint and several liability doctrine, the measure is not unconstitutional on its face.

IV.

(6a) Plaintiff's second major contention is that even if the lower courts were correct in upholding the constitutionality of the proposition, the trial court and Court of Appeal were nonetheless in error in concluding that the newly enacted statute should apply retroactively to causes of action - like the present action - which accrued prior to the effective date of the initiative measure. Plaintiff points out that prior to the enactment of Proposition 51 many individuals - both plaintiffs and defendants - relied on the then-existing joint and several liability doctrine in deciding which parties to join in litigation and whether to accept or reject settlement offers relating to such preexisting claims, and plaintiff contends that because there is nothing in the terms of the proposition which indicates that it is to apply retroactively to defeat such reliance, the lower courts erred in giving it such an application. In response, defendants contend that retroactive application is warranted in light of the nature and purposes of the initiative measure.

A.

Before analyzing the retroactivity principles and precedents discussed by both parties, we must address a threshold contention, raised by a number of amici, who assert that there is no need to consider the retroactivity issue at all in this case. Although defendants themselves do not suggest that application of Proposition 51 to causes of action which accrued prior to its effective date but which did not come to trial until after such effective date would constitute only a prospective, rather than a retroactive, application of the measure, several amici have put forth that suggestion, arguing that by confining the measure's operation to trials conducted after the initiative's effective date the Court of Appeal simply applied Proposition 51 prospectively. The Court of Appeal did not rest its conclusion on this theory and, as we explain, the governing cases do not support amici's contention.

In *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388 [182 P.2d 159] - perhaps the leading modern California decision on the subject - the same argument was raised by injured parties who contended that a new statute, increasing workers' compensation benefits, should be applied ***1206** to awards made by the workers' compensation board after the effective date of the new statute, even though the awards pertained to injuries which the workers had suffered before the new legislation was enacted. The injured employees argued that such an application of the statute to future awards would constitute a prospective, rather than a retroactive, application of the statute.

In *Aetna Cas.*, this court, speaking through Chief Justice Gibson, emphatically rejected the argument, explaining that "'[a] retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute.'" (30 Cal.2d at p. 391.) "Since the industrial injury is the basis for any compensation award, the law in force at the time of the injury is to be taken as the measure of the injured person's right of recovery." (*Id.* at p. 392.) (7) Decisions of both the United States Supreme Court and the courts of our sister states confirm that the application of a tort reform statute to a cause of action which arose prior to the effective date of the statute but which is tried after the statute's effective date would constitute a retroactive application of the statute. (See, e.g., *Winfree v. Nor. Pac. Ry. Co.* (1913) 227 U.S. 296 [57 L.Ed. 518, 33 S.Ct. 273]; *Joseph v. Lowery* (1972) 261 Or. 545 [495 P.2d 273].) Accordingly, amici's argument that the legal principles relating to the retroactive application of statutes are not relevant in this case is clearly without merit.

B.

The fact that application of Proposition 51 to the instant case would constitute a retroactive rather than a prospective application of the statute is, of course, just the beginning, rather than the conclusion, of our analysis. Although plaintiff maintains that a retroactive application of the statute would be unconstitutional (cf. *In re Marriage of Buol* (1985) 39 Cal.3d 751, 759-764 [218 Cal.Rptr. 31, 705 P.2d

354]), defendants properly observe that in numerous situations courts have upheld legislation which modified legal rules applicable to pending actions. (See, e.g., *San Bernardino County v. Indus. Acc. Com.* (1933) 217 Cal. 618, 627-629 [20 P.2d 673].) Because the question whether a statute is to apply retroactively or prospectively is, in the first instance, a policy question for the legislative body which enacts the statute, before reaching any constitutional question we must determine whether, as a matter of statutory interpretation, Proposition 51 should properly be construed as prospective or retroactive. If, as a matter of statutory interpretation, the provision is prospective, no constitutional question is presented.

(8) In resolving the statutory interpretation question, we are guided by familiar legal principles. In the recent decision of ***1207***United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79-80 [74 L.Ed.2d 235, 243-244, 103 S.Ct. 407], Justice (now Chief Justice) Rehnquist succinctly captured the well-established legal precepts governing the interpretation of a statute to determine whether it applies retroactively or prospectively, explaining: "*The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. [Citations.] This court has often pointed out*: '[*T*]he first rule of construction is that legislation must be considered as addressed to the future, not to the past. ... The rule has been expressed in varying degrees of strength but always of one import, that *a retrospective operation will not be given to a statute which interferes with antecedent rights ... unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature*."' [Citation.]" (Italics added.)

California authorities have long embraced this general principle. As Chief Justice Gibson wrote for the court in *Aetna Cas. & Surety Co.* v. *Ind. Acc. Com., supra*, 30 Cal.2d 388 - the seminal retroactivity decision noted above - "[i]t is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." (30 Cal.2d at p. 393.) This rule has been repeated and followed in innumerable decisions. (See, e.g., *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 884 [221 Cal.Rptr. 509, 710 P.2d 309]; *Glavinich v. Commonwealth Land Title Ins. Co.* (1984) 163 Cal.App.3d 263, 272 [209 Cal.Rptr. 266]. See generally 5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 288, pp. 3578-3579.)

Indeed, Civil Code section 3, one of the general statutory provisions governing the interpretation of all the provisions of the Civil Code - including the provision at issue in this case - represents a specific legislative codification of this general legal principle, declaring that "[*n*]*o part of* [*this Code*] *is retroactive, unless expressly so declared*." (Italics added.) [FN11] Like similar provisions found in many other codes (see, e.g., ***1208**Code Civ. Proc., § 3; Lab. Code, § 4), section 3 reflects the common understanding that legislative provisions are presumed to operate prospectively, and that they should be so interpreted "unless express language or clear and unavoidable implication negatives the presumption." (*Glavinich v. Commonwealth Land Title Ins. Co., supra*, 163 Cal.App.3d 263, 272.)

> FN11 In *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587, footnote 3 [128 Cal.Rptr. 427, 546 P.2d 1371], the court specifically recognized that "[s]ection 3 of the Civil Code embodies the common law presumption against retroactivity," and numerous decisions of this court have recognized that comparable provisions in other codes represent legislative embodiments of this general legal principle. (See, e.g., *Aetna Cas. & Surety Co. v. Ind. Acc. Com., supra*, 30 Cal.2d 388, 395 [Lab. Code]; *In re Estrada* (1965) 63 Cal.2d 740, 746 [48 Cal.Rptr. 172, 408 P.2d 948] [Pen. Code]. See also *DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 172-173 [18 Cal.Rptr. 369, 367 P.2d 865].) To the extent that dictum in a footnote in the Court of Appeal decision in *Andrus v. Municipal Court* (1983) 143 Cal.App.3d 1041, 1045-1046, footnote 1 [192 Cal.Rptr. 341], discussing a similar provision of the Code of Civil Procedure, suggests that such a provision has no application to amendments to such codes and applies only to the original provisions of the codes, that dictum is contrary to the numerous Supreme Court decisions noted above and must be disapproved. (See also *Estate of Frees* (1921) 187 Cal. 150, 155-156 [201 P. 112] and cases cited.)

The dissenting opinion - relying on passages in a few decisions of this court to the effect that the presumption of prospectivity is to be "subordinated ... to the transcendent canon of statutory construction

that the design of the Legislature be given effect ... [and] is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent" (*Marriage of Bouquet, supra*, 16 Cal.3d 583, 587 [italics deleted]; *Mannheim v. Superior Court* (1970) 3 Cal.3d 678, 686-687 [91 Cal.Rptr. 585, 478 P.2d 17]; *In re Estrada, supra*, 63 Cal.2d 740, 746) - apparently takes the position that the well-established legal principle which Justice Rehnquist suggested was "familiar to every law student" (see *United States v. Security Industrial Bank, supra*, 459 U.S. 70, 79 [74 L.Ed.2d 235, 243]) is inapplicable in this state and that Civil Code section 3 and other similar statutory provisions have virtually no effect on a court's determination of whether a statute applies prospectively or retroactively. The language in the decisions relied on by the dissent, however, generally has not been, and should not properly be, interpreted to mean that California has embraced a unique application of the general prospectivity principle, distinct from the approach followed in other jurisdictions (see generally 2 Sutherland on Statutory Construction (4th ed. 1986) § 41.04, pp. 348-350), so that the principle that statutes are presumed to operate prospectively ordinarily has no bearing on a court's analysis of the retroactivity question and may properly be considered by a court only as a matter of last resort and then only as a tie-breaking factor.

In the years since *Estrada, supra*, 63 Cal.2d 740, *Mannheim, supra*, 3 Cal.3d 678, and *Marriage of Bouquet, supra*, 16 Cal.3d 583, both this court and the Courts of Appeal have generally commenced analysis of the question of whether a statute applies retroactively with a restatement of the fundamental principle that "legislative enactments are generally presumed to operate prospectively and not retroactively unless the Legislature expresses a different intention." (See, e.g., *Fox v. Alexis* (1985) 38 Cal.3d 621, 637 [214 Cal.Rptr. 132, 699 P.2d 309]; *White v. Western Title Co., supra*, 40 Cal.3d 870, 884; *Hoffman v. Board of Retirement* (1986) 42 Cal.3d 590, 593 [229 Cal.Rptr. 825, 724 P.2d 511]; *Baker v. Sudo* (1987) 194 Cal.App.3d 936, 943 [240 Cal.Rptr. 38]; *Sagadin* v. *Ripper* (1985) 175 Cal.App.3d 1141, 1156 [221 Cal.Rptr. 675]; *Glavinich* v. *Commonwealth Land Title Ins. Co., supra*, 163 Cal.App.3d 263, 272.) These numerous precedents demonstrate that California continues to adhere to the time-honored principle, codified ***1209** by the Legislature in Civil Code section 3 and similar provisions, that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application. The language in *Estrada*, *Mannheim*, and *Marriage of Bouquet* should not be interpreted as modifying this well-established, legislatively-mandated principle.

(6b) Applying this general principle in the present matter, we find nothing in the language of Proposition 51 which expressly indicates that the statute is to apply retroactively. [FN12] Although each party in this case attempts to stretch the language of isolated portions of the statute to support the position each favors, [FN13] we believe that a fair reading of the proposition as a whole makes it clear that the subject of retroactivity or prospectivity was simply not addressed. As we have explained, under Civil Code section 3 and the general principle of prospectivity, the absence of any express provision directing retroactive application strongly supports prospective operation of the measure. Although defendants raise a number of claims in an attempt to escape the force of this well-established principle of statutory interpretation, none of their contentions is persuasive.

FN12 The full text of Proposition 51 is set out in the appendix to this opinion.

FN13 Plaintiff, taking his cue in part from a portion of the Court of Appeal decision in *Russell* v. *Superior Court, supra*, 185 Cal.App.3d 810, 818-819, suggests that the use of the word "shall" in various passages in the statute indicates that the drafters intended only a future operation. As defendants contend, however, in context we think it is more likely that the use of "shall" was intended to reflect the mandatory nature of the provision, rather than to refer to its temporal operation. Defendants, in turn, rely on the initial clause of Civil Code section 1431.2, which states simply that the provision is to apply "[i]n any action. ..." That familiar language, however, merely negates any implication that the new several liability rule was to apply only to a specific category of tort cases - like the earlier medical malpractice tort legislation - and provides no indication that a retroactive application was contemplated. Similar broad, general language in other statutory provisions has not been considered sufficient to indicate a legislative intent that the statute is to be applied retroactively. (See, e.g., *United States v. Security*

Industrial Bank, supra, 459 U.S. 70, 82, fn. 12 [74 L.Ed.2d 235, 245] ["'[a] few words of general connotation appearing in the text of statutes should not be given a wide meaning contrary to a settled policy, " excepting as a different purpose is plainly shown.'" [Citation]"]; *Un. Pac. R.R. v. Laramie Stock Yards* (1913) 231 U.S. 190, 199-202 [58 L.Ed. 179, 182-183, 34 S.Ct. 101].)

C.

Defendants initially contend that even though there is no express language in the statute calling for retroactive application, an intent that the provision should apply retroactively can clearly be inferred from the objectives of the legislation, as reflected in the stated "findings and declaration of purpose" accompanying the provision and in the ballot arguments which ***1210** were before the voters at the time the measure was adopted. [FN14] (9) As defendants correctly point out, on a number of occasions in the past we have found that even when a statute did not contain an express provision mandating retroactive application, the legislative history or the context of the enactment provided a sufficiently clear indication that the Legislature intended the statute to operate retrospectively that we found it appropriate to accord the statute a retroactive application. (See, e.g., *Marriage of Bouquet, supra,* 16 Cal.3d 583; *Mannheim, supra,* 3 Cal.3d 678, 686.) [FN15]

FN14 Civil Code section 1431.1, the introductory section of Proposition 51 which sets forth various "findings" and a "declaration of purpose," provides in full: "The People of the State of California find and declare as follows: [¶] (a) The legal doctrine of joint and several liability, also known as 'the deep pocket rule', has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers. [¶] (b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People - taxpayers and consumers alike - ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums. [¶] (c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums. Therefore, the People of the State of California declare that to remedy these inequities, defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable. [¶] The People of the State of California further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses."

FN15 In *In re Estrada, supra,* 63 Cal.2d 740, the court also held that a statutory enactment should be applied retroactively despite the absence of an express retroactivity clause, but that case involved considerations quite distinct from the ordinary statutory retroactivity question. In *Estrada,* the Legislature had amended a criminal statute to reduce the punishment to be imposed on violators; the amendment mitigating punishment was enacted after the defendant in *Estrada* had committed the prohibited act but before his conviction was final. Following the rule applied by the United States Supreme Court and a majority of states (see 63 Cal.2d at p. 748), the *Estrada* court concluded that the defendant should receive the benefit of the mitigated punishment "because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (63 Cal.2d at p. 745.) Although some of the broad language in *Estrada* was subsequently invoked in the civil context in the *Mannheim, supra,* 3 Cal.3d 678, and *Marriage of Bouquet, supra,* 16 Cal.3d 583, decisions, the rationale for the *Estrada* ruling bears little relationship to the determination of the retroactivity of most nonpenal statutes, and, as noted below, other jurisdictions have not applied the special rule applicable to ameliorative penal provisions in determining

the retroactivity of a general tort reform measure like Proposition 51. We similarly conclude that the *Estrada* decision provides no guidance for the resolution of this case.

(6c) Defendants assert that consideration of the factors deemed relevant to the inquiry into legislative intent in those cases - e.g., "'[the] context [of the legislative enactment], the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject"' (***1211***Marriage of Bouquet, supra*, 16 Cal.3d 583, 587) - supports retroactive application of the legislation at issue here. As we shall explain, we cannot agree.

To begin with, unlike *Marriage of Bouquet* or *Mannheim*, there is nothing in either the statutory "findings and declaration of purpose" or the brochure materials which suggests that, notwithstanding the absence of any express provision on retroactivity, the retroactivity question was actually consciously considered during the enactment process. In *Marriage of Bouquet*, the court, in concluding that the statute at issue in that case should be applied retroactively, relied, in part, on the Legislature's adoption of a resolution, shortly after the enactment of the measure, indicating that the retroactivity question was specifically discussed during the legislative debate on the measure and declaring that the provision was intended to apply retroactively (see *Marriage of Bouquet, supra*, 16 Cal.3d at pp. 588-591); in *Mannheim*, the statute in question incorporated by reference a separate statutory scheme which had expressly been made retroactive, and the *Mannheim* court reasoned that the Legislature must have intended the later statute to have a parallel application to the provision on which it was expressly fashioned. (See *Mannheim, supra*, 3 Cal.3d at pp. 686-687.) Defendants can point to nothing in the election brochure materials which provide any comparable confirmation of an actual intention on the part of the drafters or electorate to apply the statute retroactively.

Indeed, when "'the history of the times and of legislation upon the same subject"' (*Marriage of Bouquet, supra*, 16 Cal.3d at p. 587) is considered, it appears rather clear that the drafters of Proposition 51, in omitting any provision with regard to retroactivity, must have recognized that the statute would not be applied retroactively. As we have noted briefly above, the tort reform measure instituted by Proposition 51 paralleled somewhat similar tort reform legislation - MICRA - which was enacted in the mid-1970's in response to a liability insurance crisis in the medical malpractice field. In *Bolen v. Woo* (1979) 96 Cal.App.3d 944, 958-959 [158 Cal.Rptr. 454] and *Robinson v. Pediatric Affiliates Medical Group, Inc.* (1979) 98 Cal.App.3d 907, 911-912 [159 Cal.Rptr. 791], two separate panels of the Court of Appeal addressed the question whether one of the tort reform provisions of MICRA should apply retroactively to a cause of action that accrued prior to MICRA's enactment but which was tried after the act went into effect. In both *Bolen* and *Robinson*, the courts held that in the absence of a specific provision in the legislation calling for such retroactive application, the general presumption of prospective application should apply; the *Bolen* court observed that if the Legislature had intended the statute to apply retroactively it "could very easily have inserted such language in the statute itself. It chose not to do so." (96 Cal.App.3d at p. 959.) Because at least one of the principal institutional proponents and drafters of Proposition 51 was very ***1212** much involved in the post-MICRA litigation, [FN16] it appears inescapable that - given the *Bolen* and *Robinson* decisions - the drafters of Proposition 51 would have included a specific provision providing for retroactive application of the initiative measure if such retroactive application had been intended. (Cf. *Aetna Cas. & Surety Co., supra*, 30 Cal.2d 388, 396 ["it must be assumed that the Legislature was acquainted with the settled rules of statutory interpretation, and that it would have expressly provided for retrospective operation of the amendment if it had so intended."].) Since the drafters declined to insert such a provision in the proposition - perhaps in order to avoid the adverse political consequences that might have flowed from the inclusion of such a provision - it would appear improper for this court to read a retroactivity clause into the enactment at this juncture.

FN16 The Association for California Tort Reform (ACTR) is one of numerous organizations that have filed amici curiae briefs in this case. In its brief, ACTR states that it sponsored the legislation that was "the precursor to and model for Proposition 51" and that its chairman "was the official proponent who filed Proposition 51 with the California Attorney General requesting preparation of a title and summary for placement on the ballot." ACTR participated as an amicus in many of the leading MICRA cases. (E.g., *American Bank & Trust Co. v. Community Hospital, supra*, 36 Cal.3d 359; *Fein v. Permanente Medical Group, supra*, 38 Cal.3d 137.)

D.

Defendants contend, however, that whether or not *the drafters* of the proposition intended that the measure would apply retroactively, it is the intent of *the electorate* that is controlling, and they maintain that, in light of the purposes of the proposition, it is evident that the voters must have intended a retroactive application.

This argument, while novel, is flawed in a number of fundamental respects. To begin with, although the intent of the electorate would prevail over the intent of the drafters if there were a reliable basis for determining that the two were in conflict, in the present case there is simply no basis for finding any such conflict. Neither the Legislative Analyst's analysis of Proposition 51 nor any of the statements of the proponents or opponents that were before the voters in the ballot pamphlet spoke to the retroactivity question, and thus there is no reason to believe that the electorate harbored any specific thoughts or intent with respect to the retroactivity issue at all. (10) Because past cases have long made it clear that initiative measures are subject to the ordinary rules and canons of statutory construction (see, e.g., *Carter v. Seaboard Finance Co.* (1949) 33 Cal.2d 564, 579-582 [203 P.2d 758]; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, supra*, 22 Cal.3d 208, 244-246), informed members of the electorate who happened to consider the retroactivity issue would presumably have concluded that the measure - like other statutes - would be ***1213** applied prospectively because no express provision for retroactive application was included in the proposition.

(6d) Furthermore, defendants' claim that the "remedial" purpose of the measure necessarily demonstrates that the electorate must have intended that the proposition apply retroactively cannot be sustained. Although the "findings and declaration of purpose" included in the proposition clearly indicate that the measure was proposed to remedy the perceived inequities resulting under the preexisting joint and several liablity doctrine and to create what the proponents considered a fairer system under which "defendants in tort actions shall be held financially liable in closer proportion to their degree of fault" (Civ. Code, § 1431.1), such a remedial purpose does not necessarily indicate an intent to apply the statute retroactively. Most statutory changes are, of course, intended to improve a preexisting situation and to bring about a fairer state of affairs, and if such an objective were itself sufficient to demonstrate a clear legislative intent to apply a statute retroactively, almost all statutory provisions and initiative measures would apply retroactively rather than prospectively. In light of the general principles of statutory interpretation set out above, and particularly the provisions of Civil Code section 3, the contention is clearly flawed. (See, e.g. *Aetna Cas. & Surety Co. v. Ind. Acc. Com., supra*, 30 Cal.2d at p. 395.) [FN17]

FN17 Justice Gibson's opinion in *Aetna Cas. & Surety Co., supra*, clearly demonstrates the untenability of defendants' claim that the remedial nature of a statute is sufficient to support an inference that the statute was intended to apply retroactively. As noted above, in *Aetna* the question before the court was whether a statute which increased workers' compensation benefits should be applied to workers who had sustained work-related injuries prior to the enactment of the new law but who were not awarded benefits until after the new statute took effect. In that case, unlike the present matter, of course, it was the injured parties who sought retroactive application of the statute; the workers argued that in light of the remedial nature of the increased benefits and the statutory mandate that provisions of the workers' compensation law be liberally construed to extend benefits to injured workers (Lab. Code, § 3202), the court should infer an intent on the part of the Legislature to apply the act retroactively even though the act contained no express provision to that effect.
In rejecting the argument, the *Aetna* court observed: "No authority is cited for the novel doctrine which would require the court to ignore the rule against retroactive operation with respect to statutes increasing benefits to persons favored by remedial legislation. The rule of liberal construction and the rule that statutes should ordinarily be construed to operate prospectively are neither inconsistent nor mutually exclusive. ... It would be a most peculiar judicial reasoning which would allow one such doctrine to be invoked for the purpose of destroying the other. *It seems clear, therefore, that the legislative intent in favor of the retrospective operation of a statute cannot be implied from the mere fact that the statute is remedial and subject to the rule of liberal construction*." (Italics added.)

(*Aetna Cas. & Surety Co., supra,* 30 Cal.2d at p. 395.)

What defendants' contention overlooks is that there are special considerations - quite distinct from the merits of the substantive legal change embodied in the new legislation - that are frequently triggered by the ***1214** application of a new, "improved" legal principle retroactively to circumstances in which individuals may have already taken action in reasonable reliance on the previously existing state of the law. Thus, the fact that the electorate chose to adopt a new remedial rule for the future does not necessarily demonstrate an intent to apply the new rule retroactively to defeat the reasonable expectations of those who have changed their position in reliance on the old law. (11) The presumption of prospectivity assures that reasonable reliance on current legal principles will not be defeated in the absence of a clear indication of a legislative intent to override such reliance.

The Oregon Supreme Court's decision in *Joseph v. Lowery, supra,* 495 P.2d 273 illustrates the point quite well, in a context closely related to the instant case. The question at issue in *Joseph* was whether a newly enacted comparative-negligence statute should be applied retroactively to a cause of action which accrued before the passage of the statute but which did not come to trial until after the new law went into effect. The plaintiff in that case, like defendants in this case, argued forcefully that the court should infer from the remedial nature of the legislative change that the Legislature intended to apply the newly enacted, more equitable comparative negligence rule to all cases tried after the passage of the new legislation, even when the cause of action accrued prior to the enactment; the plaintiff emphasized, in this regard, that the defendant's "primary conduct" at the time of the accident was obviously not undertaken in reliance on the contributory negligence doctrine.

The Oregon Supreme Court rejected the plaintiff's argument for retroactive application of the statute, explaining: "Certainly, no one has an accident upon the faith of the then existing law. However, it would come as a shock to someone who has estimated his probable liability arising from a past accident, and who has planned his affairs accordingly, to find that his responsibility therefor is not to be determined as of the happening of the accident but is also dependent upon what the legislature *might* subsequently do. Every day it is necessary in the conduct of the affairs of individuals and of businesses to make a closely calculated estimate of the responsibility or lack thereof resulting from an accident or from other unforeseen and unplanned circumstances and to act in reliance on such estimate. We believe there is merit in the prior view of this court, as demonstrated by its decisions, that, in the absence of an indication to the contrary, legislative acts should not be construed in a manner which changes legal rights and responsibilities arising out of transactions which occur prior to the passage of such acts." (495 P.2d at p. 276.) The vast majority of other courts - including the United States Supreme Court - which have faced the question whether a remedial statute replacing the all-or-nothing contributory negligence doctrine ***1215** with a more equitable comparative negligence rule should be applied retroactively to causes of action which accrued prior to the date of the comparative negligence statute, when the enactment is silent on the retroactivity issue, have reached the same conclusion as the *Joseph* court, applying the new remedial statute prospectively only. [FN18]

FN18 See, e.g., *Winfree v. Nor. Pac. Ry. Co., supra,* 227 U.S. 296; *Brewster v. Ludtke* (1933) 211 Wis. 344 [247 N.W. 449, 450]; *Edwards* v. *Walker* (1973) 95 Idaho 289 [507 P.2d 486, 488]; *Dunham* v. *Southside National Bank* (1976) 169 Mont. 466 [548 P.2d 1383]; *Rice* v. *Wadkins* (1976) 92 Nev. 631 [555 P.2d 1232, 1233]; *Smith* v. *Shreeve* (Utah 1976) 551 P.2d 1261, 1262, footnote 2; *Scammon v. City of Saco* (Me. 1968) 247 A.2d 108, 110; *Costa* v. *Lair* (1976) 241 Pa.Super. 517 [363 A.2d 1313, 1314-1315]; *Viers* v. *Dunlap* (1982) 1 Ohio St.3d 173 [438 N.E.2d 881]; contra, *Godfrey* v. *State* (1975) 84 Wash.2d 959 [530 P.2d 630].
Many of the recent comparative negligence statutes are not silent on the point, but specifically address the prospective/retroactive question. (See generally Schwartz, Comparative Negligence (2d ed. 1986) § § 8.3-8.5, pp. 143-152.) Of the numerous statutes which expressly speak to the issue, all but two specifically provide for prospective operation. (*Ibid.*) The Uniform Comparative Fault Act, drafted by the National Conference of Commissioners on Uniform State Laws as a model for state laws on the subject, similarly contains a provision which mandates prospective application, declaring that "[t]his Act applies to all [claims for relief] [causes of action] which accrue after

its effective date." (§ 10.)

(6e) Although, as we have noted, there is no indication that the voters in approving Proposition 51 consciously considered the retroactivity question at all, if they had considered the issue they might have recognized that retroactive application of the measure could result in placing individuals who had acted in reliance on the old law in a worse position than litigants under the new law. We briefly examine why retroactive application of the proposition could have such a consequence.

To begin with, plaintiffs whose causes of action arose long before Proposition 51 was enacted will often have reasonably relied on the preexisting joint and several liability doctrine in deciding which potential tortfeasors to sue and which not to sue. Given the joint and several liability rule, plaintiffs may reasonably have determined that while there may have been other tortfeasors - in addition to the defendants named in their complaint - who might also be responsible for their injuries, there was no reason to go to the added expense and effort to attempt to join such other tortfeasors, since plaintiffs could recover all of their damages - economic and noneconomic - from the named defendants. Such plaintiffs would have understood, of course, that under the then-governing rules, the named defendants could bring any additional tortfeasors into the suit through cross-complaints if the defendants desired.

While Proposition 51 itself, of course, does not bar a plaintiff from joining additional tortfeasors - indeed, its effect in the future well may be to encourage plaintiffs to join every conceivable responsible party - the ***1216** retroactive application of the measure to preexisting causes of action would frequently have the effect of depriving plaintiffs of any opportunity to recover the proportion of noneconomic damages attributable to absent tortfeasors, because in many cases the statute of limitations on the plaintiff's preexisting cause of action against such an absent tortfeasor will have run before the enactment of Proposition 51. [FN19] Thus, while there is nothing in the language or legislative history of Proposition 51 to suggest that the electorate intended to cut off a plaintiff's opportunity to obtain full recovery for noneconomic damages, the retroactive application of the measure would frequently have just such an effect.

FN19 Although in the present case we do not know the additional parties plaintiff may have chosen to sue if Proposition 51 had been in effect at the outset of the litigation, defendants - in connection with their post-Proposition 51 filings - have suggested that some responsibility for the accident may lie either with some of plaintiff's friends or with plaintiff's parents. The statute of limitations on any cause of action plaintiff may have had against such individuals has, of course, long since run.

In similar fashion, retroactive application of the proposition to actions which were pending prior to the adoption of the measure would frequently defeat the reasonable expectations of parties who entered into settlement agreements in reliance on the preexisting joint and several liability rule. Acting on the assumption that any nonsettling defendants would remain fully liable for both economic and noneconomic damages, plaintiffs in pre-Proposition 51 actions may frequently have settled with some defendants for a lesser sum than they would have accepted if they were aware that the remaining defendants would only be severally liable for noneconomic damages. By contrast, plaintiffs who settle causes of action accruing after Proposition 51 would be fully aware of the applicable principles.

Furthermore, retroactive application of Proposition 51 could also have unanticipated, adverse consequences for settling defendants as well. As noted above, under pre-Proposition 51 law, a defendant could choose to enter into a settlement agreement with the plaintiff which settled the plaintiff's entire claim against all defendants, and could thereafter bring an equitable comparative indemnity action against other tortfeasors to compel them to bear their fair share of the amount which the settling defendant had paid in settlement of the plaintiff's claim. (See, e.g., *Sears, Roebuck & Co. v. International Harvester Co., supra*, 82 Cal.App.3d 492, 496; *American Bankers Ins. Co. v. Avco-Lycoming Division, supra*, 97 Cal.App.3d 732, 736.) Under preexisting law, if a settling defendant pursued such a course of action and if one or more of the culpable tortfeasors proved to be insolvent, the shortfall caused by such insolvency would be shared on an equitable basis by all of the solvent tortfeasors. (See, e.g., *Paradise Valley Hospital v. Schlossman, supra*, 143 Cal.App.3d 87, 93.) If Proposition 51 were applied ***1217** retroactively to causes of action that accrued prior to its enactment, however, a nonsettling tortfeasor who was faced with an indemnity claim brought by a settling tortfeasor would be able to limit his liability for noneconomic damages to a percentage equal to his own personal

degree of fault, and the settling tortfeasor - who had entered into the settlement in reliance on the preexisting state of the law - would be left to absorb by himself any proportion of the noneconomic damages that was attributable to an insolvent tortfeasor or tortfeasors.

Thus, retroactive application of the measure to past litigation could have unexpected and potentially unfair consequences for all parties who acted in reliance on the then-existing state of the law. Prospective application of the measure, while withholding the remedial benefits of the provision from defendants in pending actions, would assure that all parties to litigation were aware of the basic "ground rules" when they decided whom to join in the action and on what terms the case should be settled.

Of course, we do not suggest that most or even many voters were aware of the consequences that would result from the retroactive application of Proposition 51. A review of these consequences does indicate, however, that a voter who supported the remedial changes embodied in Proposition 51 would not necessarily have supported the retroactive application of those changes to defeat the reasonable expectations of individuals who had taken irreversible actions in reliance on the preexisting state of the law.

To avoid misunderstanding, a caveat is in order. It is no doubt possible that an informed electorate, aware of the consequences of retroactive application, would nonetheless have chosen to make the statute retroactive if the retroactivity or prospectivity issue had been directly presented to it. The crucial point is simply that because Proposition 51 did not address the retroactivity question, we have no reliable basis for determining how the electorate would have chosen to resolve either the broad threshold issue of whether the measure should be applied prospectively or retroactively, or the further policy question of *how* retroactively the proposition should apply if it was to apply retroactively: i.e., whether the new rule should apply to cases in which a complaint had not yet been filed, to cases which had not yet come to trial, to cases in which a trial court judgment had not yet been entered, or to cases which were not yet final on appeal. [FN20] ***1218**

> FN20 The dissenting opinion asserts that in light of the remedial purposes of Proposition 51, "the inference is virtually inescapable' that the electorate intended the proposition to apply to all trials conducted after the effective date of the measure. (See, *post*, at pp. 1232-1233.) The dissenting opinion apparently overlooks the fact, however, that most states which enacted tort reform measures similar to Proposition 51 in response to the same liability crisis which precipitated Proposition 51, and which specifically addressed the retroactivity issue in their statutes, did *not* provide for retroactive application of the newly enacted reforms to all cases tried after the new enactment. (See, *post*, at pp. 1219-1220.) In light of these other enactments, it is difficult to understand how the dissent can find it "inescapable" from the context and purpose of the enactment that such a retroactive application must have been intended.

As we have explained above, the well-established presumption that statutes apply prospectively in the absence of a clearly expressed contrary intent gives recognition to the fact that retroactive application of a statute often entails the kind of unanticipated consequences we have discussed, and ensures that courts do not assume that the Legislature or the electorate intended such consequences unless such intent clearly appears. Because in the present matter there is nothing to suggest that the electorate considered these results or intended to depart from the general rule that statutory changes operate prospectively, prospective application is required. [FN21]

> FN21 The dissenting opinion discusses a number of cases which it suggests support the proposition that remedial statutes are generally intended to apply retroactively. (See *post*, pp. 1233-1235.) The cases discussed by the dissent, however, did not involve general tort reform statutes, like Proposition 51, but rather concerned statutory enactments implementing procedural changes in circumstances in which it was unlikely that retroactive application would defeat a party's reasonable reliance on the displaced procedural rule.
> In its discussion of the proper interpretation of remedial statutes, the dissent makes no mention of the numerous decisions of both the United States Supreme Court and of state courts throughout the country which have overwhelmingly concluded that a tort reform statute, which is silent on the retroactivity question, should be applied

prospectively to causes of action accruing after the effective date of the new statute. (See fn. 18, *ante*, p. 1215.)

E.

Defendants next argue that even if the remedial nature of Proposition 51 is not sufficient to indicate an intent on the part of the electorate to apply the measure retroactively, this court should infer such an intent from the fact that the measure's statement of purpose and the election brochure arguments demonstrate that the proposition was adopted to meet a liability insurance crisis. Defendants maintain that because it will be years before causes of action which accrue after the effective date of the proposition actually come to trial, a prospective application of the measure would not effectuate the purpose of alleviating the insurance crisis and thus could not have been intended by the electorate. For a number of reasons, we conclude that this argument cannot be sustained.

To begin with, defendants' account of the consequences of prospective application of the measure is inaccurate in a number of significant respects. First, because liability insurance premiums are based in part, if not exclusively, on the damages that the insurance company anticipates it will incur for the risks which will be covered by the policy, any anticipated reduction in damages to be awarded in the future for causes of action which arise ***1219** during policy periods following the act should logically be reflected in an immediate reduction in the premiums which potential defendants pay for post-act insurance coverage. Thus, prospective application of the proposition could reasonably have been expected to afford immediate benefits to potential defendants. Similarly, to the extent governmental or other activities had been curtailed because of the fear of the anticipated financial consequences of future accidents, the knowledge that any such future incidents would be governed by the provisions of Proposition 51 would logically support prompt resumption of the activities.

Moreover, because the insurance premiums which potential defendants had paid prior to the enactment of Proposition 51 for coverage of pre-Proposition 51 accidents were presumably computed, at least in part, on the assumption that the then-prevailing joint and several liability doctrine would apply to the covered incidents, a retroactive application of the measure might be expected to provide a windfall to defendants' insurers, rather than a direct benefit to the insureds themselves because the initiative contained no provision requiring insurers to return any portion of previously collected premiums to their insureds. Indeed, this potential consequence of retroactive application may have been one reason the drafters of the measure chose not to include an express retroactivity provision in the measure; if this potential insurance company windfall from retroactive application had been brought to the attention of the electorate, it might well have detracted from the popularity of the measure.

Finally, defendants' suggestion that a prospective application of Proposition 51 will mean that it will be years before the measure will affect the actual damages paid by defendants in tort cases overlooks the fact that the vast majority of tort actions are resolved by settlement rather than by trial. Because the amounts at which cases are settled reflect the defendant's potential liability at trial, the effects of Proposition 51 on damages actually paid by defendants are likely to be felt at a much earlier date than defendants predict even if the measure is applied prospectively.

Thus, we cannot agree that prospective application is inconsistent with the objective of alleviating a liability-insurance crisis.

Indeed, a review of other statutory provisions, similar to Proposition 51, which were enacted in other states at approximately the same time as Proposition 51 and in response to the same concerns over the effects of high liability insurance premiums, [FN22] demonstrates that this factor does not necessarily ***1220** evidence an intent to apply the statute retroactively to all cases tried after the effective date of the enactment. In the numerous statutes altering the joint and several liability rule which were enacted throughout the country in 1986 and 1987, the various state legislatures not only adopted different substantive variants of several liability (see fns. 5, 6, 7, *ante*), but also arrived at differing conclusions as to whether the newly enacted statutes should be applied retroactively to preexisting causes of action. Several of the new statutes were explicitly made applicable only to causes of action accruing after the date of the new legislation (Fla.Stat.Ann. § 768.71(2) (West Supp. 1987); Mo.Ann.Stat. § 538.235 (Vernon Supp. 1987); Ill.Ann.Stat., ch. 110, note following paras. 2- 1117, 2-1118 (Smith-Hurd Supp. 1987); 1987 Nev.Stat., ch. 709, § 2), some of the enactments apply only to cases filed on or after the effective date of the statute (1986 Colo.Sess. Laws, ch. 108, § 7; 1986 Wash. Laws, ch. 305, § 910; 1986 N.Y. Laws, ch. 682, §

12; 1987 Tex. Acts, 70th Leg., 1st C.S., ch. 2, § 4.05, in Tex.Civ.Prac. & Rem. Code Ann., note following § 9.001 (Vernon 1988)), and only one of the statutes - which adopted a several liablity rule limited to less culpable governmental defendants - applies to cases "pending on or commenced on or after" the date of the enactment (1986 Minn. Laws, ch. 455, § 95). These varying responses, of course, are relevant to the question before us only inasmuch as they demonstrate that other legislative bodies which enacted statutes in response to the same liability crisis that precipitated Proposition 51 and which consciously focused on the retroactivity question arrived at different conclusions of whether, and to what extent, such a statutory modification should apply to preexisting causes of action. Because the provision before us is silent on the question, the general presumption which dictates a prospective application in the absence of a clear contrary intent must control.

FN22 The preambles of a number of the 1986 and 1987 statutes closely track the "Findings and Declaration of Purpose" in Proposition 51. (See, e.g., 1986 Wash. Laws, ch. 305, § 100; Tex. Acts 1987, 70th Leg., 1st C.S., ch. 2, § 1.01, in Tex.Civ.Prac. & Rem. Code Ann., note following § 9.001 (Vernon 1988).)

The California decision most closely on point directly supports this conclusion. As noted above, in *Bolen v. Woo, supra*, 96 Cal.App.3d 944, 958- 959, the Court of Appeal addressed the question whether one of the tort reform provisions of MICRA should apply retroactively to a cause of action that accrued prior to MICRA's enactment but that was tried after the act went into effect. The defendant in *Bolen*, like defendants in this case, relied heavily on the fact that the preamble of MICRA demonstrated that the measure was adopted in response to a crisis caused by "skyrocketing" liability insurance costs [FN23] and argued that that purpose established an intent ***1221** to apply the act retroactively. The *Bolen* court rejected the contention, relying on the general principle of prospectivity discussed above and emphasizing that if the Legislature had intended the statute to apply retroactively it "could very easily have inserted such language in the statute itself. It chose not to do so." (96 Cal.App.3d at p. 959.)

FN23 The preamble to MICRA read in part: "The Legislature finds and declares that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state. The Legislature, acting within the scope of its police powers, finds the statutory remedy herein provided is intended to provide an adequate and reasonable remedy within the limits of what the foregoing public health and safety considerations permit now and into the foreseeable future." (Stats. 1975, 2d Ex. Sess. 1975-1976, ch. 2, § 12.5, p. 4007.)

In light of *Bolen*, if the proponents of Proposition 51 felt that the liability crisis necessitated a retroactive application of the measure's provisions, it seems evident that they would have included an express retroactivity provision in the proposition.

F.

Defendants next argue that, despite the absence of any express retroactivity provision, Proposition 51 should be applied retroactively by analogy to this court's retroactive application of the decisions in *Li v. Yellow Cab, supra*, 13 Cal.3d 804, and *American Motorcycle Association* v. *Superior Court, supra*, 20 Cal.3d 578, to at least some cases that were pending at the time those decisions were rendered. (See *Li, supra*, 13 Cal.3d 804, 829; *Safeway stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 333-334 [146 Cal.Rptr. 550, 579 P.2d 441].) For a number of reasons, those decisions do not support defendants' claim.

First, both *Li, supra*, 13 Cal.3d 804, and *American Motorcycle, supra*, 20 Cal.3d 578, involved changes in common law tort doctrine that were made by judicial decision, not statutory enactment. As the earlier quotation from Chief Justice Rehnquist makes clear, as a general rule there is a fundamental difference between the retroactivity of statutes and the retroactivity of judicial decisions: "The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. [Citations.]" (*United States v. Security Industrial Bank, supra*, 459 U.S. 70, 79 [74 L.Ed.2d 235, 243].) It is because of this difference in the governing legal principles that in most states in which the comparative negligence rule has been adopted through judicial decision - like California - the newly adopted rule has been applied to at least

some pending cases (see Schwartz, Comparative Negligence (2d ed. 1986) § 8.2, pp. 140-143), while in those states in which comparative negligence has been established by statute, the change has almost uniformly been applied prospectively. (See *id*., § § 8.3, 8.4, pp. 143-149; see also fn. 17, *ante*.) Thus, the fact that the ***1222** judicial modifications of tort doctrines in *Li* and *American Motorcycle* were accorded some retroactive application provides no support for defendants' claim that the subsequent legislative modification of a tort doctrine in Proposition 51 should apply retroactively.

Second, defendants' argument overlooks a related, but somewhat more fundamental, point. Because in the *Li, supra,* 13 Cal.3d 804, and *American Motorcycle, supra,* 20 Cal.3d 578, cases it was the court which made the policy decision that the common law rules at issue in those cases should be changed, the court was the appropriate body to determine whether or not the new rule should be applied retroactively and, if so, how retroactively. (See generally *Gt. Northern Ry. v. Sunburst Co.* (1932) 287 U.S. 358 [77 L.Ed. 360, 53 S.Ct. 145, 85 A.L.R. 254]; *Peterson v. Superior Court* (1982) 31 Cal.3d 147, 151- 153 [181 Cal.Rptr. 784, 642 P.2d 1305].) In the present case, by contrast, it was the electorate who made the policy decision to implement a change in the traditional common law rule, and thus it was the voters who possessed the authority to decide the policy question of whether the new statute should be applied retroactively. Unlike in *Li* or in *American Motorcycle*, in this case our court has no power to impose its own views as to the wisdom or appropriateness of applying Proposition 51 retroactively. Because, as we have discussed above, the proposition is silent on the retroactivity question, Civil Code section 3 and well-founded principles of statutory interpretation establish that the statute must be interpreted to apply prospectively.

G.

Finally, defendants contend that Proposition 51 should be applied retroactively by analogy to a line of California cases, beginning with *Tulley v. Tranor* (1878) 53 Cal. 274, which have applied a number of statutory amendments, which modified the legal measure of damages recoverable in an action for wrongful conversion of personal or real property, to all trials conducted after the effective date of the revised statute. (See also *Feckenscher v. Gamble* (1938) 12 Cal.2d 482 [85 P.2d 885]; *Stout v. Turney* (1978) 22 Cal.3d 718, 727 [150 Cal.Rptr. 637, 586 P.2d 1228].) [FN24] ***1223**

FN24 In *Tulley, supra,* 53 Cal. 274, the question at issue was the application of the amended version of Civil Code section 3336, setting forth the measure of damages for wrongful conversion of personal property. At the time the cause of action in *Tulley* arose, section 3336 provided, inter alia, that "[t]he detriment caused by the wrongful conversion of personal property is presumed to be the value of the property at the time of conversion, with the interest from that time, *or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party* ..." (italics added); prior to the trial of the action, the section was amended to delete the emphasized portion of the statute.

In *Feckenscher, supra,* 12 Cal.2d 482, the statutory change at issue involved a revision of Civil Code section 3343, pertaining to the measure of damages in a real estate fraud action. Although the opinion does not quote the version of section 3343 in effect at the time the action arose, it appears that at that point the statute permitted a defrauded plaintiff to recover a sum equal to the difference between defendant's representation as to the value of the property which plaintiff received and the actual value of that property; as revised, section 3343 permitted recovery of "the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received ...."

Stout, supra, 22 Cal.3d 718, like *Feckenscher, supra,* 12 Cal.2d 482, dealt with a revision of Civil Code section 3343, setting forth the measure of damages in a real estate fraud action.

To begin with, we believe defendants clearly overstate the scope of the *Tulley* line of cases in suggesting that those decisions establish a broad rule that in California any statutory provision which affects the amount of damages which an injured person may recover is presumptively retroactive. As we have seen, the seminal decision in *Aetna Cas. & Surety Co., supra,* 30 Cal.2d 388 - decided long after *Tulley, supra,* 53 Cal. 274 - applied the general presumption of prospective application to a statutory provision which increased the damages or benefits recoverable in a workers' compensation action.

Similarly, the two relatively recent MICRA cases noted above (*Bolen v. Woo, supra*, 96 Cal.App.3d 944; *Robinson v. Pediatrics Affiliates Medical Group, Inc., supra*, 98 Cal.App.3d 907) applied the traditional principle of prospective application to a provision of MICRA which affected the damages which a plaintiff could recover in a medical malpractice action. (Civ. Code, § 3333.1 [modification of collateral source rule].) Indeed, in our even more recent decision in *White v. Western Title Ins. Co., supra*, 40 Cal.3d 870, 884, this court, after noting that """[i]t is a general rule of construction ... that, unless the intention to make it retrospective clearly appears from the act itself, a statute will not be construed to have that effect"' [citations]," went on to observe that "[t]his rule is particularly applicable to a statute which *diminishes* or extinguishes an existing cause of action." (Italics added.) (*Ibid*.) Thus, it is not accurate to suggest that the ordinary presumption of prospectivity is inapplicable to any statute which modifies damages; after all, Civil Code section 3, which codifies the common law presumption of prospectivity with respect to provisions of the Civil Code, contains no exception for statutes relating to damages.

Instead, *Tulley, supra*, 53 Cal. 274, and its progeny were primarily concerned with an entirely separate issue. In *Aetna Cas. & Surety Co., supra*, 30 Cal.2d 388, our court, in discussing Feckenscher v. *Gamble, supra*, 12 Cal.2d 482 - one of the cases in the *Tulley* line - observed that in *Feckenscher* the court had found that the language of the statute in question showed that the Legislature intended the measure to be applied retroactively, and that "the court was concerned mainly with the question of whether the Legislature has power to give those laws such retroactive effect. " (30 Cal.2d at p. 393.) The *Tulley* decision, too - after finding that the statutory ***1224** language left "no reasonable doubt that the amendment was intended to be applicable to a case in which the conversion had occurred prior to its passage" (53 Cal. at p. 278) [FN25] - focused primarily on the question of whether the Legislature had the constitutional authority to apply a new measure of damages to causes of action which accrued prior to the enactment of the new statute but which came to trial after the enactment, concluding that the Legislature did have such authority. (See 53 Cal. at pp. 279-280.) Thus, while *Tulley* and its progeny do provide support for the claim that it is not necessarily unconstitutional for the Legislature to alter the measure of damages with respect to preexisting causes of action, those decisions do not purport to reject the ordinary presumption of prospectivity or to adopt a new legal standard for determining whether the Legislature intended a statute to be retroactive or prospective; the decisions simply found that the language of the statutes at issue in those cases demonstrated that the measures were intended to apply retroactively.

> FN25 In reaching its conclusion on the statutory interpretation issue, the *Tulley* court relied on the fact that the section in question provided that "[t]he detriment caused by the wrongful conversion of personal property *is presumed to be* ..." (italics added), reasoning that " [t]he expression 'is presumed to be' indicates that it was intended to establish a legal presumption to operate, and which could only operate, at the trial of the cause ...." (53 Cal. at pp. 278-279.)

As we have noted above, of course, the question whether Proposition 51 may constitutionally be applied retroactively is quite distinct from the question whether the proposition should be properly interpreted as retroactive or prospective as a matter of statutory interpretation. (12) The *Aetna Cas. & Surety Co*. decision makes it clear that the *Tulley* line of cases cannot properly be interpreted as displacing ordinary principles of statutory interpretation with regard to the question of retroactivity. (See *Aetna Cas. & Surety Co., supra*, 30 Cal.2d at pp. 393-394.) Other jurisdictions have also generally applied the traditional presumption of prospective application to statutes which modify the amount of damages recoverable in tort actions. (See generally Annot. (1964) 98 A.L.R.2d 1105; Annot. (1977) 80 A.L.R.3d 583, 601-602.)

In any event, Proposition 51 is quite unlike the statutory provisions at issue in *Tulley, supra*, 53 Cal. 274, or its progeny in a number of important respects. First of all, unlike the statutes in those cases, Proposition 51 does not purport to alter either the measure or the total amount of damages that a plaintiff may recover for a particular tort. Although Proposition 51 does affect the amount of noneconomic damages a particular tortfeasor may be required to pay when more than one tortfeasor is responsible for an injury, and may have the effect of reducing a plaintiff's ultimate recovery if one or more tortfeasors are insolvent, nothing in the measure evidence a legislative ***1225** objective of denying a plaintiff the opportunity to obtain full recovery for both economic and noneconomic damages by joining all responsible tortfeasors and collecting the

appropriate proportion of noneconomic damages from each tortfeasor. As we have discussed above, however, retroactive application of the measure would often have the effect of placing plaintiffs in pending actions in a worse position than plaintiffs in future actions, since plaintiffs in pending actions may no longer have the ability to join all potentially liable tortfeasors because of the statute of limitations. Thus, whereas application of the statutory provisions at issue in the *Tulley* line of cases to both pending and future actions at least accorded like treatment to current and future plaintiffs, retroactive application in this case would not have an equalizing effect, but would impose a unique detriment on one class of plaintiffs. Accordingly, it is more difficult to assume in this case, than it was in the *Tulley* cases, that retroactive application was intended.

Second, given the nature of the statutory revision at issue in the *Tulley* line of cases, it was unlikely that the parties in pending actions had taken any irreversible actions or changed their position in reliance on the preexisting measure of damages. By contrast, as discussed above, many plaintiffs and defendants in pending actions undoubtedly relied on the preexisting joint and several liability rule in conducting their litigation prior to enactment of Proposition 51. On this ground, too, their is more reason in this case than in the *Tulley* decisions to question whether a retroactive application of the statute was intended.

Finally, it is impossible to ignore that the statutory change at issue here, modifying a long-standing common law doctrine applicable to all negligence actions, represents a much more substantial and signficant change in the law than the narrow statutory modifications at issue in the *Tulley* cases. Because of the widespread impact of retroactive application of Proposition 51, the need for an express statement of legislative intent becomes all the more essential.

Accordingly, the *Tulley* line of cases does not support the retroactive application of Proposition 51. [FN26] ***1226**

> FN26 Although defendants in this case have not embraced the argument, several amici contend that Proposition 51 should be applied retroactively on the ground that the measure is "procedural" rather than "substantive. " The Court of Appeal, while concluding that retroactive application was warranted, nonetheless expressly rejected this argument, reasoning that because the provision could have a substantial effect on a defendant's liability or a plaintiff's recovery, "its substantive effect is evident." We agree with the Court of Appeal that retroactive application cannot be supported by characterizing Proposition 51 as merely a "procedural " statute. In addressing the question whether the retroactivity question may be resolved by denominating a statute as "substantive" or "procedural, " the court in *Aetna Cas. & Surety, supra*, 30 Cal.2d 388, 394, explained: "In truth, the distinction relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears. " As explained above, retroactive application of Proposition 51 to preexisting causes of action would have a very definite substantive effect on both plaintiffs and defendants who, during the pending litigation, took irreversible actions in reasonable reliance on the then-existing state of the law. (See also 3 Harper et al., Law of Torts (2d ed. 1986) § 10.1, p. 7 ["The joint and several liability imposed on joint tortfeasors or independent concurrent tortfeasors producing an indivisible injury is a ' substantive liability' to pay entire damages. This differs from what might be described as a 'procedural liability' to be joined with other tortfeasors as defendants in a single action."].)

H.

Having reviewed defendants' numerous arguments, we think it may be useful, in conclusion, to take a last look at one particularly instructive precedent. In *Winfree v. Nor. Pac. Ry. Co*. (1913) 227 U.S. 296 [57 L.Ed. 518, 33 S.Ct. 273], the United States Supreme Court was faced with a question of statutory interpretation very similar to the question which is before us today. In 1908, the Federal Employers Liability Act - which granted railroad workers who had been injured in the course of their employment the right to bring a negligence action in federal court against the employer - had been amended to replace the doctrine of contributory negligence with comparative negligence. In *Winfree*, the plaintiff claimed that although the injury in that case had

preceded the 1908 act, the comparative negligence doctrine should nonetheless be applied because the matter had not gone to trial until after the act had gone into effect. The plaintiff maintained that because even before the 1908 enactment the defendant railroad should have known that it could be held liable if its negligence resulted in a worker's injury, there was no reason to deny the plaintiff the benefit of the new comparative negligence rule.

In *Winfree*, the Supreme Court rejected the plaintiff's contention and held that the statute could not properly be applied to preexisting causes of action. In reaching its conclusion, the court relied on "the almost universal rule that statutes are addressed to the future, not to the past. They usually constitute a new factor in the affairs and relations of men and should not be held to affect what has happened unless, indeed, explicit words be used or by clear implication that construction be required." (227 U.S. at p.301 [57 L.Ed. at p. 520].) Because the 1908 amendment "introduced a new policy and quite radically changed the existing law," the court emphasized that it was particularly the kind of statute that "should not be construed as retrospective." (*Id.* at p. 302 [57 L.Ed. at p. 520].)

As we have explained, precisely the same principle is applicable here. (6f) Proposition 51 "introduced a new policy" which will have a ***1227** broad effect on most tort actions in California. Under Civil Code section 3 and the general principles of statutory interpretation, if the measure was intended to be applied retroactively, a provision directing retroactive application should have been included. In the absence of such an express declaration of retroactivity, we conclude that the proposition must be interpreted as prospective.

V.

Because we have concluded that the Court of Appeal erred in finding that Proposition 51 applies retroactively to this case, there is no need to reach the additional issues, relating to the interpretation and application of various portions of the proposition, which were discussed by the Court of Appeal.

The decision of the Court of Appeal is affirmed insofar as it upholds the constitutionality of Proposition 51, but is reversed insofar as it holds that Proposition 51 applies to causes of action that accrued prior to the effective date of the initiative measure.

Each party shall bear its own costs in these proceedings.

Mosk, Acting C. J., Broussard, J., and Panelli, J., concurred.

KAUFMAN, J.

I concur in the majority's holding that Proposition 51, the Fair Responsibility Act of 1986 (hereafter Proposition 51 or the Act) violates neither the due process nor the equal protection guarantees of the state or federal Constitutions. I respectfully dissent, however, from its holding that Proposition 51 does not apply to causes of action which accrued before the measure's effective date. I conclude, as did the Court of Appeal, that the Act was designed to apply to all cases yet to be tried, including the instant one. Therefore, I would affirm the judgment of the Court of Appeal in its entirety.

Discussion

Because "nothing in the language of Proposition 51 ... expressly indicates that the statute is to apply retroactively," the majority concludes that it must apply prospectively. (Majority opn. at p. 1209.) Hence, the majority holds that the modified rule of joint and several liability enacted by the electorate shall not apply to any "cause of action" that *accrued* prior to the Act's effective date even if suit had not been filed before Proposition 51's enactment. ***1228**

The majority grounds its holding on three fundamental assumptions: 1) that section 3 of the Civil Code requires an express statement of retroactive intent, 2) that if the drafters of the Act had intended a retroactive application, they would have said so in the proposition, and 3) that a retroactive intent may not legitimately be inferred from sources other than the proposition itself. Each of these assumptions, as I shall explain, is legally incorrect and inconsistent with prior decisions of this court.

Aside from these three erroneous legal assumptions, the majority justifies its holding on two additional practical considerations. Application of the Act to all cases untried on its effective date, the majority asserts, would result in: 1) unfairness to plaintiffs who may have relied on the former rule of joint and several liability in making such tactical litigation decisions as whom to sue, and with whom and for how much to settle, and 2) an unwarranted "windfall" to insurance companies which computed their pre-Proposition 51 premiums on the basis of the former law. As will appear from the discussion which follows, these asserted practical considerations are

for the most part incorrect factually and in any event are unsound as a basis for decision.

The presumption of prospectivity said to be codified in Civil Code section 3 does not require an express statement of retroactive intent, nor does the absence of such a statement in the Act indicate that its drafters must have intended that the presumption should apply. The paramount consideration here, as in any other matter of statutory construction, is to ascertain the intent of the enacting body so as to effectuate the purpose of the law.

A wide variety of factors may be relevant to the determination of whether the enacting body intended a new statute to be given retroactive effect. As more fully explained below, two factors of particular relevance here are the Act's history and its express remedial purposes. When these are considered in light of the relevant facts and decisional law, the conclusion becomes nearly inescapable that the Act's purposes can be fully served only if it is applied to all cases not tried prior to its effective date.

As to the practical ramifications of an application of the Act to cases not tried before its effective date, a dispassionate analysis reveals the majority's concerns to be largely groundless. Indeed the majority implicitly concedes as much by holding that the Act shall not apply to any *cause of action* that accrued prior to its effective date *regardless* of whether the plaintiff has taken any steps which could even arguably be construed as "reliance" on the former law.

I conclude, finally, by noting the strange logic that would attempt to justify a retrospective application of the radical restructuring of tort liability ***1229** which this court effected in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393], yet condemn as "unfair" a retrospective application of the relatively limited reform enacted by the electorate through Proposition 51. The inconsistency does little credit to this court, or to the principle and appearance of judicial impartiality.

1. *Legislative Purpose and the Presumption of Prospectivity*

The first and essentially the only real point of the majority opinion - intoned, however, with the drumbeat regularity of a Hindu mantra - is that the "presumption of prospectivity" is dispositive absent an express statement of legislative intent to the contrary. No matter how often repeated, however, the point is profoundly mistaken. This court has held that the presumption of prospectivity codified in Civil Code section 3 is relevant "*only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent*." (Italics added, *In re Estrada* (1965) 63 Cal.2d 740, 746 [48 Cal.Rptr. 172, 408 P.2d 948]; accord *Fox* v. *Alexis* (1985) 38 Cal.3d 621, 629 [214 Cal.Rptr. 132, 699 P.2d 309]; *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587 [128 Cal.Rptr. 427, 546 P.2d 1371]; *Mannheim v. Superior Court* (1970) 3 Cal.3d 678, 686-687 [91 Cal.Rptr. 585, 478 P.2d 17].) As *Estrada* counseled, "That rule of construction ... is not a straightjacket. Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent." (63 Cal.2d at p. 746; accord *In re Marriage of Bouquet, supra*, 16 Cal.3d at p. 587; *Mannheim v. Superior Court, supra*, 3 Cal.3d at pp. 686-687.) This has long been the rule. (See, e.g., *Estate of Frees* (1921) 187 Cal. 150, 156 [201 P. 112] [retroactive operation may be " *inferred* ... from the words of the statute taken by themselves and in connection with the subject matter, and the occasion of the enactment .... " (Italics added.)].) And as this court has recently reaffirmed, "An express declaration that the Legislature intended the law to be applied retroactively is not necessarily required." (*Fox v. Alexis, supra*, 38 Cal.3d at p. 629.)

The majority attempts to distinguish our holdings in *Mannheim, supra*, 3 Cal.3d 678 and *Marriage of Bouquet, supra*, 16 Cal.3d 583, on the ground that there is no evidence in this case to show "the retroactivity question was *actually consciously considered* during the enactment process." (Majority opn. at p. 1211, italics added.) None of our prior decisions, however, has ever suggested that Civil Code section 3 requires proof of a "conscious " legislative decision that a statute or initiative should operate retroactively. On the contrary, *Estrada*, *Mannheim*, *Marriage of Bouquet* and *Fox, supra*, 38 Cal.3d 621, all emphatically reaffirm the traditional rule that legislative intent may - indeed *must* - in the absence of an express declaration be ***1230** "deduced" from a "wide variety" of "pertinent factors, " including the "context of the legislation, its objective, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction ...." (*Fox v. Alexis, supra*, 38 Cal.3d at p. 629; *In re Marriage of Bouquet, supra*, 16 Cal.3d at p. 591; *Mannheim v. Superior Court, supra*, 3 Cal.3d at pp. 686- 687; *In re Estrada, supra*, 63 Cal.2d at p. 746.)

The majority's fundamental misunderstanding of these basic principles leads it into other errors. Thus, the majority assumes that "the drafters of Proposition 51 would have included a specific provision providing for retroactive application of the initiative measure if such retroactive application had been intended." (Majority opn. at p. 1212.) That is a false assumption. As we have seen, where the language of the statute is silent, the courts may *not* automatically assume that the enacting body must have intended that the law should apply prospectively. On the contrary, the presumption of prospectivity " [i]s to be applied only *after*, considering *all* pertinent factors, it is determined that it is *impossible* to ascertain the legislative intent." (*In re Estrada, supra,* 63 Cal.2d at p. 746, italics added.)

Indeed, if we properly assume that the proponents of Proposition 51 were aware of the relevant law when they chose to remain silent, it is not unlikely that they assumed the Act would apply to all cases not yet tried, and thus had no reason to expressly so provide. As the majority notes, statutes which modify the recoverability of damages have frequently been held by this court to be applicable to cases not yet tried. (See, e.g. *Tulley v. Tranor* (1878) 53 Cal. 274; *Feckenscher v. Gamble* (1938) 12 Cal.2d 482 [85 P.2d 885]; *Stout v. Turney* (1978) 22 Cal.3d 718 [150 Cal.Rptr. 637, 586 P.2d 1228].) [FN1] Contrary to the majority's assumption, therefore, if anything may reasonably be inferred from the Act's silence (which I do not strongly advocate, inasmuch as the evidence of *intent* is controlling) it is that the Act should apply retrospectively to all cases not yet tried.

> FN1 Proposition 51, of course, does not actually change the amount of damages that plaintiffs may be awarded, but merely modifies the allocation of noneconomic damages among tortfeasors. Thus, it constitutes *less* of a change than a modification of the measure of damages so as to reduce the amount recoverable.

Nor does *Bolen v. Woo* (1979) 96 Cal.App.3d 944 [158 Cal.Rptr. 454], the "decision most closely on point" according to the majority, suggest otherwise. The issue in that case was whether an amendment to the Civil Code (§ 3333.1) which abrogated the "collateral source" rule in actions against health care providers applied retroactively. The *Bolen* court noted that prior to passage of the legislation, the Legislative Counsel rendered an opinion which counseled that the statute "would fall within the proscription ***1231** against retroactive application ...." (96 Cal.App.3d at p. 958.) Thus, "[a]rmed ... with ... counsel's opinion on retroactivity ..., " the *Bolen* court concluded, the Legislature's silence could be considered sufficient *proof of its intent* that the statute should apply prospectively. (*Id.* at p. 959.) The majority's reliance on *Bolen* for the proposition that mere legislative silence triggers the presumption of prospectivity is clearly misplaced.

2. *Retroactive Intent and Remedial Purpose*

Based on the mistaken notion that the presumption of prospectivity governs absent an express declaration to the contrary, the majority concludes that a retroactive intent may not validly be inferred from other sources. However, the law is precisely to the contrary. We have consistently held that the presumption applies "only after, considering *all pertinent factors*, it is determined that it is impossible to ascertain the legislative intent." (*In re Estrada, supra,* 63 Cal.2d at p. 746, italics added.) As we recently reaffirmed in *Fox v. Alexis, supra,* 38 Cal.3d 621, a "wide variety of factors may be relevant to our effort to determine whether the Legislature intended a new statute to be given retroactive intent. The context of the legislation, its objective, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction may all indicate the legislative purpose." (*Id.* at p. 629.) Two factors of particular relevance here are the "history of the times" and the perceived "evils to be remedied" by the Act.

The majority laudably prefaces its discussion of Proposition 51 with a "brief historical perspective." (Majority opn. at pp. 1196-1199.) The perspective provided, however, consists almost entirely of prior decision of this court. There is, curiously, almost no mention of the dramatic context in which Proposition 51 was conceived and adopted, of the so-called "liability crisis " or the pitched battle among government agencies, business interests, insurers, and consumer advocates over the origins of the perceived crisis or the efficacy of Proposition 51 to alleviate it; no mention of the increasingly common multimillion dollar tort judgments or the alleged inequities of the " deep-pocket" rule that saddled public agencies and other institutions with damages far beyond their proportion of fault; no mention of the prohibitive insurance premiums that had forced numerous persons and entities from doctors to day-care centers, municipal corporations to corporate giants, to either go " bare" or go out of business; and no mention, finally, of the electorate's overwhelming approval, by

a vote of 62 percent to 38 percent, of the tort-reform measure designed to mitigate this crisis, the Fair Responsibility Act of 1986, or Proposition 51.

An awareness of historical context illuminates more than merely the spirit of the Act; it clarifies the letter of the law, as well. The text of the Act ***1232** begins with an unusually forthright statement of "Findings and Declaration of Purpose." The Act sets forth three specific findings: "(a) The legal doctrine of joint and several liability, also known as the 'deep pocket rule', has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers. [¶] (b) ... Under joint and several liability, if ['deep pocket defendants'] are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People - taxpayers and consumers alike - ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums. [¶] (c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums."

In light of these express findings, the Act explicitly declares that its purpose is "to remedy these inequities" by holding defendants "liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable." The Act "further declare[s] that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses."

Thus, it is clear from the plain language of the Act as well as from the context in which it was adopted, that Proposition 51 was conceived in crisis, and dedicated to the proposition that the "'deep pocket rule' has resulted in a system of *inequity and injustice*." Its express goals were no less than to avert "*financial bankruptcy*," to "avoid *catastrophic economic consequences*," to stave off "*higher taxes*" and "*higher prices*," and to preserve "*essential* " public services.

In light of these express remedial purposes, the inference is virtually inescapable that the electorate intended Proposition 51 to apply as soon and as broadly as possible. When the electorate voted to reform a system perceived as "inequitable and unjust," they obviously voted to change that system *now*, not in five or ten years when causes of action that accrued prior to Proposition 51 finally come to trial. When they voted to avert "financial bankruptcy" and "catastrophic economic consequences," to stave off "higher prices ... and higher taxes," and to preserve essential public "services," they clearly voted for *immediate* relief, not gradual reform five or ten years down the line. A crisis does not call for *future* action. It calls for action *now*, action across the board, action as broad and as comprehensive as the Constitution will allow. It is clear that the purposes of Proposition 51 will be ***1233** fully served only if it is applied to all cases not tried prior to its effective date.

The law not only permits, but compels such an inference. When legislation seeks to remedy an existing inequity or to impose a less severe penalty than under the former law, the courts of this state have long held that the enacting body must have intended that the statute should apply to matters that occurred prior to its enactment. This concept found classic expression in *In re Estrada, supra*, 63 Cal.2d 740, where we held, notwithstanding the statutory presumption against retroactivity, that when an amendatory statute lessening punishment becomes effective prior to the final date of judgment, the amendment applies rather than the statute in effect when the prohibited act occurred. (*Id.* at pp. 744-745.) The amendment in question had indicated a legislative determination that the former punishment was too severe. Therefore, we reasoned, the Legislature must have intended that the new statute should apply to every case to which it constitutionally could apply, for "to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance," an objective contrary to civilized standards of justice. (*Id.* at p. 745; accord *People v. Durbin* (1966) 64 Cal.2d 474, 479 [50 Cal.Rptr. 657, 413 P.2d 433]; *Holder v. Superior Court* (1969) 269 Cal.App.2d 314, 316-317 [74 Cal.Rptr. 853].)

The courts have applied similar reasoning to statutes designed to remedy inequities in the civil law. "In the construction of remedial statutes ... regard must always be had for the evident purpose for which the statute was enacted, and if the *reason* of the statute extends to past transactions, as well as to those in the future, then it will be so applied ...." (*Abrams v. Stone* (1957) 154 Cal.App.2d 33, 42 [315 P.2d 453], italics added; accord *Coast Bank v. Holmes* (1971) 19 Cal.App.3d 581, 595 [97 Cal.Rptr. 30].)

For example, In *Harrison v. Workmen's Comp.*

Appeals Bd. (1974) 44 Cal.App.3d 197 [118 Cal.Rptr. 508], the court held that an amendment to the Labor Code which provided a cutoff date of five years for employer exposure to claims of occupational injury applied retrospectively to injuries incurred prior to the amendment's effective date. After reviewing the "procedural morass," delays and expense attendant upon the former law, the court concluded that the remedial purpose of the law required a retrospective application notwithstanding the absence of language in the statute manifesting such an intent: "[T]he amended legislation was designed and introduced for the purpose of ameliorating the procedural morass which has faced the board in multiple defendant cases. Thus, it is clear that the *purpose of the amendment was to remedy an immediate situation which was imposing undue delay and expense upon litigants and hardship upon disabled employees* ... [*T*]he object of that legislation will not be effectuated unless ***1234** the board is permitted to apply the amendment retrospectively as well as prospectively. We conclude that it was the intent of the Legislature that it be so applied." (*Id.* at pp. 205-206, italics added.)

Like reasoning also supported the decision in *City of Sausalito* v. *County of Marin* (1970) 12 Cal.App.3d 550 [90 Cal.Rptr. 843], where the court held that an amendment to the Government Code which relaxed the procedural standards governing local zoning proceedings applied retroactively. "It reasonably appears that the Legislature enacted section 65801 as a *curative statute* for the purpose of terminating recurrence of judicial decisions which had invalidated local zoning proceedings for technical procedural omissions. [Citations.] *This legislative purpose would be fully served only if the section were applied ... regardless of whether the offending procedural omission occurred before or after the section's enactment.*" (*Id.* at pp. 557-558, italics added.)

In *Andrus v. Municipal Court* (1983) 143 Cal.App.3d 1041 [192 Cal.Rptr. 341], the issue was whether an amendment that repealed the statutory right to appeal from an extraordinary writ proceeding in the superior court challenging an action in the municipal court, applied to appeals filed before the effective date of the legislation. Though the language of the amendment was silent as to intent, the court concluded that the "obvious *goal* of the amendment ... suggests *the logic of retroactive application*." (*Id.* at p. 1046, italics added.) The former statute, the court noted, provided broader appellate review of relatively trivial matters in the municipal court than was accorded an accused in the superior court. Therefore, "[t]o deny retroactive application to the amendment," the court concluded, "is to subscribe to the notion that the Legislature desired *to postpone the demise of a procedural loophole which was inequitable to defendants accused of more serious offenses,* [*and*] *placed unnecessary and redundant burdens on the appellate courts. ... We find that proposition absurd*." (*Id.* at p. 1047, italics added.)

It is, therefore, a fairly prosaic rule which holds that a retrospective intent may be inferred from a specific and compelling remedial purpose. The question before us is whether such an inference is justified in this case. As noted earlier, Proposition 51 was designed with the express intent to " remedy ... inequities" in the existing rule of joint and several liability, inequities which threatened grave and imminent harm to the public weal. Indeed, such reform was "necessary," the Act declared, "to avoid *catastrophic economic consequences* for state and local governmental bodies as well as private individuals and businesses." (Italics added.) If this was not language evocative of "the logic of retroactive application" (*Andrus v. Municipal Court, supra,* 143 Cal.App.3d at p. 1046), then nothing is. ***1235**

To deny retroactive application to the Act would infer an intent to postpone the repeal of a rule which its drafters expressly condemned as inequitable and unjust. Indeed, it would infer an intent to perpetuate that rule in potentially thousands of actions that accrued prior to the Act's effective date. Instead of a fair and *uniform* system of liability, it would infer that the drafters intended a *dual* system of justice, where the courts would apply a reformed rule of joint and several liability to one set of defendants, and a discredited, inequitable rule to another. I find that proposition patently untenable as well as unjust.

Nevertheless, the majority insists that a retroactive intent may not be inferred from a clear and compelling statement of remedial purpose. The reason, according to the majority, is that "[m]ost statutory changes are ... intended to ... bring about a fairer state of affairs" and therefore "almost all statutory provisions and initiative measures would apply retroactively rather than prospectively." (Majority opn. at p. 1213.) Furthermore, the majority asserts, this court rejected a similar argument nearly 40 years ago in *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388 [182 P.2d 159]. Neither of these contentions withstands scrutiny.

Aetna concerned the retroactivity of an amendment to the Labor Code that increased workers' compensation benefits. In support of a retrospective application of the law, the injured workers relied on the statutory mandate that provisions of the Workers' Compensation Act are to be "liberally construed " to extend their benefits to injured workers. (Lab. Code, § 3203.) We rejected the workers' argument, however, holding that a retrospective intent could not be "implied from the mere fact that the statute is remedial and subject to the rule of liberal construction." (30 Cal.2d at p. 395.) The doctrine of "liberal construction" and the presumption of prospectivity, we noted, were merely two canons of construction, and "[i]t would be a most peculiar judicial reasoning," we observed, "which would allow one such doctrine to be invoked for the purpose of destroying the other." (30 Cal.2d at p. 395.)

Aetna therefore stands for the simple proposition that one general canon of construction (that workers' compensation provisions are to be "liberally " construed) does not supersede another (that statutes are presumed to apply prospectively). The case at bar bears no resemblance to *Aetna*. Here the evidence relating to remedial intent consists not of abstract principles unrelated to the statute at issue, but of clear and unmistakable statements of particular remedial purposes in the Act itself, and of similar indications implicit in the history of the Act. The cases and authorities previously cited not only permit, but *demand* that we examine these expressions of remedial purpose for whatever clues they may provide on the question of retroactivity, and nothing in *Aetna, supra*, 30 Cal.3d 388, indicates otherwise. ***1236**

There is equally little merit to the majority's assertion that the Act's remedial purposes are irrelevant because many statutes could be described as " remedial." The argument suggests that courts are powerless to weigh the probative value of the evidence of remedial purpose in each case, and decide whether an inference of retrospective intent reasonably and logically follows. Indeed, that is precisely the sort of function which courts perform daily.

Moreover, the purpose here was not merely remedial; it was to remedy a *crisis*. The question before us is whether, from that purpose, it may reasonably be inferred that the Act should apply to all cases not tried prior to its effective date. The evidence and our prior decisions overwhelmingly demonstrate that the answer to that question is "yes."

3. *The Fairness Issue*

A. *The Insurance "Windfall"*

I am greatly troubled by the majority's apparent concern that application of the Act to cases untried on the Act's effective date would result in an unwarranted "windfall" to insurance companies because they computed their pre-Proposition 51 premiums on the basis of the former rule of unlimited joint and several liability. A little perspective here is in order. In *Li v. Yellow Cab, supra*, 13 Cal.3d 804, this court abrogated the traditional all-or-nothing doctrine of contributory negligence and adopted in its place a rule of comparative negligence. A few years later, in *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578 [146 Cal.Rptr. 182, 578 P.2d 899], we applied similar comparative fault principles to multiple tortfeasors, but retained the traditional rule of joint and several liability. In each case, we held that the new rule "shall be applicable to *all cases in which trial has not begun* before the date this decision becomes final ...." (Italics added, *Li v. Yellow Cab Co., supra*, 13 Cal.3d at p. 829; *Safeway Stores, Inc.* v. *NestKart* (1978) 21 Cal.3d 322, 334 [146 Cal.Rptr. 550, 579 P.2d 441] [applying retroactively the rule adopted in *American Motorcycle]*.)

By thus retrospectively eliminating the existing complete defense of contributory negligence and yet retaining joint and several liability, this court imposed substantially *increased* liability upon insurance companies under policies the premiums for which had been calculated on the basis of the preexisting law. Yet we expressed no concern in those decisions that insurance companies were thereby compelled to pay greatly increased sums with respect to risks they could not have anticipated and for which they were not compensated. Nor did we decline to apply our abrupt change in the law retrospectively because to do so would have been "unfair." On the contrary, we applied our rulings as broadly as constitutionally permissible, notwithstanding ***1237** strenuous objections that such a radical alteration of existing law required legislative rather than judicial action, because we were "persuaded that logic, practical experience, and *fundamental justice* counsel against the retention of the doctrine rendering contributory negligence a complete bar to recovery .... " (*Li v. Yellow Cab Co., supra*, 13 Cal.3d at pp. 812-813, italics added.)

Consistency and impartiality would appear to demand, at the very least, that this court view the fiscal consequences to insurance companies of a

retrospective application of Proposition 51, with the same cool detachment it manifested in *Li* and *American Motorcycle*. Proposition 51, after all, was also designed to remedy certain perceived *injustices* in the existing tort liability system. If a retrospective application results in a "windfall" to insurers, what of it? Where the logic and justice of a retroactive application is otherwise compelling, I perceive no principled basis for holding to the contrary simply because the insurance industry might benefit.

Indeed, if the majority's assertion that a retroactive application will result in savings to insurers is correct (the contention is premised on speculation, not on any hard evidence), it would appear to militate in favor rather than against retroactivity. As previously discussed, one of the goals of Proposition 51 was to slow the insurance-premium spiral by holding defendants liable for noneconomic damages only in proportion to their percentage of fault. As set forth in the Act's findings, the so-called insurance crisis "threatened financial bankruptcy of local governments ... higher prices for goods and services to the public and higher taxes to taxpayers." To the extent that the Act results in less exposure and smaller payouts than insurance companies might otherwise have anticipated, it only serves to *further* these goals.

The majority's inflated concern with insurance "windfalls" is thus largely misguided. That concern does, however, expose the unstated bias underlying the majority's opinion. Implicit in the majority's analysis is the assumption that Proposition 51 was essentially a private-interest bill designed to offer aid and comfort to corporate defendants; the broader its scope, therefore, the greater the prejudice to plaintiffs. However, if we were to judge the question before us strictly on a standard of fairness to *plaintiffs*, there is no doubt that the balance would fall squarely on the side of retroactivity. The Act's statement of findings makes clear that its purpose was not exclusively or even principally to aid insurance companies. Ultimately, it is plaintiffs, not insurers, who suffer when tortfeasors lack insurance to pay judgments. It is the community as a whole, not the insurance industry, which suffers when day-care centers must close because they cannot afford insurance. Parochial interests, to be sure, supported the Act, but the People enacted it. ***1238** Their decision deserves an application equal to the pressing social and economic concerns which inspired it.

B. *The "Reliance" Issue*

Of course, in response to all of the arguments that militate in favor of retroactivity, one may justly recall that one party's gain is another party's loss. Proposition 51 purported to remedy an "inequity" in the existing joint-and-several doctrine by abrogating the rule as it applied to noneconomic damages. Though the Act placed no limit on the amount of noneconomic damages that plaintiffs could be awarded, it restricted plaintiffs' right to full recovery of such damages in some instances by allowing recovery as to those damages from defendants only in proportion to their fault.

Courts may properly consider whether the retrospective application of a statute would affect substantial rights, or substantially alter rules on which the parties have detrimentally relied. (*Hoffman v. Board of Retirement* (1986) 42 Cal.3d 590, 593 [229 Cal.Rptr. 825, 724 P.2d 511].) [FN2] The question presented, therefore, is whether an application of the Act to all cases not tried prior to its effective date would, as the majority asserts, unfairly deprive plaintiffs of "a legal doctrine on which [they] may have reasonably relied in conducting their legal affairs prior to the new enactment. " (Majority opn. at p. 1194.)

> FN2 Indeed, courts have long attempted to distinguish statutes that affect "substantive" rights from those that affect merely "procedural " rights in determining the propriety of retrospective operation. (See, e.g. *Abrams v. Stone*, *supra*, 154 Cal.App.2d 33 at p. 41; *Coast Bank v. Holmes*, *supra*, 19 Cal.App.3d at pp. 593-594.) Some courts have even suggested that statutes which affect only "procedural" matters should not be defined as "retroactive" when applied to events that occurred prior to their effective date. (See, e.g. *Coast Bank v. Holmes*, *supra*, 19 Cal.App.3d at pp. 593-594; *Morris v. Pacific Electric Ry. Co.* (1935) 2 Cal.2d 764, 768 [43 P.2d 276].) As the majority correctly observes, however, this court has long since rejected such a distinction. (See *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, *supra*, 30 Cal.2d at pp. 394- 395.) The critical issue is not the form of the statute but its " effects. " (*Id*. at p. 394.)

The majority concludes that an application of the Act to cases not tried before its effective date would place persons who "acted in reliance on the old law in a worse position than litigants under the new law." (Majority opn. at p. 1215.) Two examples of such detrimental reliance are suggested. First, the majority

opines that plaintiffs whose causes of action arose before Proposition 51 "will often have reasonably relied on the preexisting joint and several liability doctrine in deciding which potential tortfeasors to sue and which not to sue." (Majority opn. at p. 1215.) Thus, the majority suggests that in reliance on the old joint and several rule, plaintiffs' attorneys "often " refrained from filing suit against *potentially liable defendants* in order to save their clients the "added expense" of service of process. (Majority opn. at p. 1215.) ***1239**

There is no evidence that this occurred in any substantial number of cases. On the contrary, general experience teaches that plaintiffs usually sue *everyone* who might be liable for damages. Indeed, in most cases the former rule of joint and several liability encouraged plaintiffs to name as many defendants as possible because the entire judgment could be recovered from any one defendant, no matter how minimally liable. In the unlikely event, however, that a potentially liable defendant was actually omitted from a complaint in reliance on the former rule, it obviously constituted a tactical decision by the plaintiff to take advantage of a part of the old rule that was entirely unfair to marginally liable, deep-pocket defendants, a part of the very unfairness Proposition 51 was intended to remedy.

The other "reliance" factor cited by the majority concerns settlements. The majority suggests that plaintiffs in pre-Proposition 51 cases "may frequently have settled with some defendants for a lesser sum than they would have accepted if they were aware that the remaining defendants would only be severally liable for noneconomic damages." (Majority opn. at p. 1216.) A moment's thought reveals that this contention, like the first, contains far less than meets the eye.

First, the argument again runs counter to common experience. In a case with multiple defendants of varying degrees of solvency, plaintiffs rarely settle first with the "deep-pocket" defendants in order to pursue the defendants who are effectively judgment-proof. Where the "deep pocket" defendant does settle first, however, it is not likely to be for substantially less than the case is worth, since there is little likelihood of substantial recovery from the remaining defendants.

Second, it is well to recall exactly what Proposition 51 provides. It repeals the joint and several rule only as applied to *noneconomic* damages, i.e. pain and suffering, emotional distress, loss of consortium and the like. (Civ. Code, § 1431.2, subd. (b)(2).) It has no effect whatsoever on the joint and several rule as applied to the more common tort damages - medical expenses, loss of earnings, loss of property, costs of repair or replacement, and loss of employment or business opportunities. (Civ. Code, § 1431.2, subd. (b)(1).) Thus, whatever reliance a settling plaintiff may have placed on the former rule of joint and several liability, that reliance *remains largely undisturbed by the enactment of Proposition 51*.

Finally, it is clear that with or without the former joint and several rule, a good faith settlement (at least since our decision in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488 [213 Cal.Rptr. 256, 698 P.2d 159]) must fall within a reasonable range of the settlor's proportionate share of liability. (*Id.* at p. 499.) As this court further recognized in *Tech-Bilt*, every settlement involves a multitude of factors which could reasonably ***1240** impel a plaintiff to settle for *less* than the settling defendant's proportionate share of fault. For example, "'a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent, and uninsured, or underinsured, joint tortfeasor.'" (*Id.* at p. 499, quoting from *Stambaugh v. Superior Court* (1976) 62 Cal.App.3d 231, 238 [132 Cal.Rptr. 843].) Other factors include the "recognition that a settlor should pay less in settlement than he would if he were found liable after a trial," as well as the obvious avoidance of the risk, costs and inconvenience of trial. (*Ibid.*)

We do not mean to suggest by this that the former "deep pockets" rule may not have influenced some plaintiffs to settle for less than a defendant's proportionate share of noneconomic damages. To the extent any such settlement was for *substantially* less than the settling defendant's estimated range of liability, however, it was unfair to nonsettling defendants and should not have been sanctioned by the trial court in the first place. (*Tech-Bilt, supra*, 38 Cal.3d at p. 499.) Moreover, when the former rule is viewed as only one out of a *myriad* of factors that *may* have legitimately influenced plaintiffs' decisions to settle for less than a defendant's proportionate share of liability, the question of reliance becomes rather hopelessly speculative. The role that the former joint-and-several rule may have played in the overall decisionmaking process is certainly far less significant than the majority implies.

In light of the foregoing, it is no surprise that the majority itself studiously ignored the "reliance" argument when formulating its holding in this matter.

For the majority broadly holds that the Act shall not apply to any " cause of action" that accrued prior to its effective date, regardless of whether plaintiffs have manifested even the slightest potential reliance on the former law. If the "reliance" argument had any merit, the majority surely would have tailored its decision to hold, at a minimum, that the Act would be inapplicable only to cases *filed* prior to its effective date. Its failure to do so reveals the makeweight nature of its "reliance" and "unfairness" arguments.

In sum, I am not persuaded by the majority's assertion that a retrospective application of Proposition 51 would result in a significant diminution of plaintiffs' rights or expectations under the former law. [FN3] On the contrary, it is clear that the purposes of the Act and the interests of the public as a whole would be served only by an application of the Act to all cases not yet tried prior to its effective date.

> FN3 Needless to say, we find no merit in plaintiffs' related contention that a retrospective application of the Act would result in an unconstitutional deprivation of vested rights.

I would note, finally, that our earlier discussion of *Li v. Yellow Cab Co., supra,* 13 Cal.3d 804 and ***1241***American Motorcycle Assn.* v. *Superior Court, supra,* 20 Cal.3d 578, also bears directly on the issue of fairness to parties who might have relied on the preexisting law. As the majority acknowledges, our decision to apply the principles of *Li* and *American Motorcycle* retrospectively affected *substantial* rights and expectations arising out of transactions that occurred before those decisions. The relatively limited reform effected by Proposition 51 pales in comparison. Yet the same court that unhesitatingly determined to apply retroactively the sweeping changes effected by *Li*, now purports to be offended when the same broad application is urged for the limited reform contained in Proposition 51. It is a puzzlement.

It is an irony, as well. For although, as the majority notes, *Li, supra,* 13 Cal.3d 804, "served to reduce much of the harshness of the original all-or-nothing common law rules, the retention of the common law joint and several liability doctrine" in *American Motorcycle, supra,* 20 Cal.3d 578, nevertheless perpetuated other inequities. Proposition 51 "was addressed," the majority observes, to these remaining problems. (Majority opn. at pp. 1197- 1198.) If the inequities in the rule of contributory negligence compelled a retrospective application of *Li*, notwithstanding its impact on settled expectations, surely the injustice inherent in the unlimited rule of joint and several liability compels an equally broad application of Proposition 51.

The majority, however, concludes otherwise, arguing that because *Li, supra,* 13 Cal.3d 804, was a judicial decision "the court was the appropriate body to determine whether or not the new rule should be applied retroactively .... " (Majority opn. at p. 1222.) No one suggests otherwise. The point, however, concerns the fairness of the court's decision to apply *Li* retroactively, not its power to do so.

The majority also attempts to distinguish *Li* on the ground that "statutes operate ... prospectively, while judicial decisions operate retrospectively. " (Majority opn. at p. 1221.) This not only misstates the general rule as applied to statutes (the *intent* of the enacting body governs the interpretation of statutes, not the presumption of prospectivity), but distorts the rule as to judicial decisions, as well. For judicial decisions are not automatically governed by a mindless "presumption" of retroactivity any more than statutes are governed by a presumption of prospectivity. As this court carefully explained in *Peterson* v. *Superior Court* (1982) 31 Cal.3d 147, 152 [181 Cal.Rptr. 784, 642 P.2d 1305], "[T]he question of retroactivity [of judicial decisions] depends upon considerations of fairness and public policy." (*Id.* at p. 152; accord *Safeway Stores, Inc. v. Nest-Kart, supra,* 21 Cal.3d at p. 333; *In re Marriage of Brown* (1976) 15 Cal.3d 838, 850 [126 Cal.Rptr. 633, 544 P.2d 561, 94 A.L.R.3d 164].) As we further explained, the issue comprehends such considerations as the "extent of the public reliance upon ***1242** the former rule," the "purpose to be served by the new rule, " and the "effect on the administration of justice of a retroactive application." (*Id.* at pp. 152-153; see also *Isbell* v. *County of Sonoma* (1978) 21 Cal.3d 61, 74-75 [145 Cal.Rptr. 368, 577 P.2d 188]; *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 193 [98 Cal.Rptr. 837, 491 P.2d 421].)

If considerations of fairness, public policy and the purposes of the new rule announced in *Li, supra,* 13 Cal.3d 804, compelled its retroactive application, notwithstanding the extensive reliance placed by insurers and others upon the former rule, surely the same broad application of Proposition 51 is compelled here. It is a strange logic indeed which can justify the retrospective application of a virtual revolution in the common law of civil liability, yet later deny similar scope to an enactment of the

electorate designed to redress certain lingering inequities in that selfsame revolution. Perhaps the commentators will be able to reconcile these differing results. I cannot.

For the foregoing reasons, I would affirm the decision of the Court of Appeal in its entirety. [FN4]

> FN4 Because of its conclusion that Proposition 51 does not apply to the case at bar, the majority does not reach the additional issues decided by the Court of Appeal and briefed by the parties, relating to the apportionment of damages to nonjoined defendants, and the meaning of " economic" damages under Proposition 51. I would affirm the Court of Appeal's well reasoned holding that under Proposition 51, damages must be apportioned among the "universe" of tortfeasors, as well as its holding that "economic" damages include future medical expenses and future loss of earnings.

Eagleson, J., and Anderson (Carl W.), J., [FN*] concurred.

> FN* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Acting Chairperson of the Judicial Council.

The petition of real party in interest Van Waters & Rogers, Inc., for a rehearing was denied June 23, 1988. ***1243**

51. Multiple Defendants Tort Damage Liability: Initiative Statute

Official Title and Summary Prepared by the Attorney General

MULTIPLE DEFENDANTS TORT DAMAGE LIABILITY: INITIATIVE STATUTE. Under existing law, tort damages awarded a plaintiff in court against multiple defendants may all be collected from one defendant. A defendant paying all the damages may seek equitable reimbursement from other defendants. Under this amendment, this rule continues to apply to "economic damages," defined as objectively verifiable monetary losses, including medical expenses, earnings loss, and others specified; however, for "non-economic damages," defined as subjective, non-monetary losses, including pain, suffering, and others specified, each defendant's responsibility to pay plaintiff's damages would be limited in direct proportion to that defendant's percentage of fault. Summary of Legislative Analyst's estimate of net state and local government fiscal impact: Under current law, governments often pay non- economic damages that exceed their shares of fault. Approval of this measure would result in substantial savings to state and local governments. Savings could amount to several millions of dollars in any one year, although they would vary significantly from year to year.

Analysis by the Legislative Analyst

Background

When someone is injured or killed, or suffers property damage, the injured party (or his or her survivors) may try to make the person (or business or government) who is responsible for the loss pay damages. When a lawsuit is filed, the courts decide what the damages are, who caused them, and how much the responsible party should pay. If the court finds that the injured party was partly responsible for the injury, the responsibility of the other party is reduced accordingly.

In some cases, the court decides that more than one other party is responsible for the loss. In such cases, *all* of the other parties causing the loss are responsible for paying the damages, and the injured party can collect the damages from any of them. If the other responsible parties are not able to pay their shares, a party whose relative fault is, for example, 25 percent may have to pay 100 percent of the damages awarded by the court.

These damages could be for two types of losses: "economic" and "non-economic. " Economic losses are damages such as lost wages and medical costs. Non-economic losses are damages such as pain and suffering or injury to one's reputation.

Proposal

This measure changes the rules governing who must pay for *non-economic damages.* It limits the liability of each responsible party in a lawsuit to that portion of non-economic damages that is equal to the responsible party's share of fault. The courts still could require one person to pay the *full* cost of *economic damages, if* the other responsible parties are not able to pay their shares.

Fiscal Effect

Under current law, governments often have to pay non-economic damages that exceed their shares of

fault. Thus, approval of this measure would result in substantial savings to the state and local governments. The savings could amount to several millions of dollars in any one year, although they would vary significantly from year to year.

Voter Turnout. Just one of the changes California is making!
Karen Alarcon, San Martin ***1244**
Text of Proposed Law
This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure amends and adds sections to the Civil Code; therefore, existing sections proposed to be deleted are printed in and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW
SECTION 1. This shall be known as the "Fair Responsibility Act of 1986."

SECTION 2. Section 1431 of the Civil Code is amended to read:

§ 1431 Joint Liability

An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, *except as provided in Section 1431.2, and* except in the special cases mentioned in the *title* on the *interpretation* of *contracts*. This presumption, in the case of a right, can be overcome only by express words to the contrary.

SECTION 3. Section 1431.1 is added to the Civil Code to read:

§ 1431.1 Findings and Declaration of Purpose

The People of the State of California find and declare as follows:

a) The legal doctrine of joint and several liability, also known as "the deep pocket rule", has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.

b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People-taxpayers and consumers alike-ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums.

Therefore, the People of the State of California declare that to remedy these inequities, defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable.

The People of the State of California further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.

SECTION 4. Section 1431.2 is added to the Civil Code to read:

§ 1431.2 Several Liability for Non-economic Damages

(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(b) (1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(2) For the purposes of this section, the term "non-

economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

SECTION 5. Section 1431.3 is added to the Civil Code to read:

§ 1431.3 Nothing contained in this measure is intended, in any way, to alter the law of immunity.

SECTION 6. Section 1431.4 is added to the Civil Code to read:

§ 1431.4. Amendment or Repeal of Measure.

This measure may be amended or repealed by either of the procedures set forth in this section. If any portion of subsection (a) is declared invalid, then subsection (b) shall be the exclusive means of amending or repealing this measure.

(a) This measure may be amended to further its purposes by statute, passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring and signed by the Governor, if at least 20 days prior to passage in each house the bill in its final form has been delivered to the Secretary of State for distribution to the news media.

(b) This measure may be amended or repealed by a statute that becomes effective only when approved by the electors.

SECTION 7. Section 1431.5 is added to the Civil Code to read:

§ 1431.5 Severability.

If any provision of this measure, or the application of any such provision to any person or circumstances, shall be held invalid, the remainder of this measure to the extent it can be given effect, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and to this end the provisions of this measure are severable. ***1245**

51. Multiple Defendants Tort Damage Liability: Initiative Statute

Argument in Favor of Proposition 51

Nothing is more unfair than forcing someone-be it a city, a county or the state, a school, a business firm or a person-to pay for damages that are someone else's fault.

That's what California's "deep pocket" law is doing-at a cost of tens of millions of dollars annually. And that's why we need Proposition 51-the Fair Responsibility Act.

Regardless of whether it is a city, county or private enterprise that is hit with huge "deep pocket" court awards or out-of-court settlements, the *TAXPAYER AND CONSUMER ULTIMATELY PAY THE COSTS* through high taxes, increased costs of goods and services, and reduced governmental services.

How does the "deep pocket" law work? Here's an illustration:

A drunk driver speeds through a red light, hits another car, injures a passenger. The drunk driver has no assets or insurance.

The injured passenger's trial lawyer sues the driver *AND THE CITY* because the city has a very "deep pocket"-the city treasury or insurance. He claims the stop light was faulty.

The jury finds the drunk driver 95% at fault, the city only 5%. It awards the injured passenger $500,000 in economic damages (medical costs, lost earnings, property damage) and $1,000,000 in non-economic damages (emotional distress, pain and suffering, etc.).

Because the driver can't pay anything, THE CITY PAYS IT ALL-$1,500,000.

THAT'S THE "DEEP POCKET" LAW AND ITS UNFAIR!

Under Proposition 51, the city could still pay all the victim's economic damages but only its 5% portion of the non-economic. Total: $550,000-that's $950,000 less!

Everyone agrees the injured passenger should be reimbursed. But there are *TWO VICTIMS*-the *ACCIDENT VICTIM* and the *TAXPAYER* who foots the bill.

Proposition 51 is a *GOOD COMPROMISE*-it takes care of both victims!

With the passage of Proposition 51:

Liability insurance, now virtually impossible to obtain, would again be available to cities and counties.

Private sector liability insurance premiums could drop 10% to 15%.

The glut of lawsuits with dubious merit would be significantly reduced.

Every California county-and virtually all its cities-are *IN FAVOR OF PROPOSITION 51*.

One of the largest coalitions of school, governmental, law enforcement, small and large business, professional, labor and non-profit organizations in history urges you to *VOTE YES ON PROPOSITION 51*.

This initiative proposition was put on the ballot by hundreds of thousands of voters because repeated attempts in the Legislature to reform the unfair "deep pocket" law were thwarted by the intense lobbying of the California Trial Lawyers Association.

The trial lawyers' organization last year was the *LARGEST GIVER* of *SPECIAL INTEREST CAMPAIGN MONEY* to state legislators and is the major organized opposition to the Fair Responsibility Act.

Under the present "deep pocket" law:

The party most at fault often doesn't pay-*THAT'S NOT FAIR!*

You-the taxpayer and consumer-ultimately pay the "deep pocket" awards and settlements-*THAT'S NOT FAIR!*

Under Proposition 51:

Victims and taxpayers alike are protected-*THAT'S FAIR!*

Don't let 5,400 trial lawyers hold 26 million Californians hostage. *VOTE YES ON PROPOSITION 51!*

RICHARD SIMPSON
California Taxpayers' Association

DONNETTA SPINK
President, California State Parent-Teacher Association

ELWIN E. (TED) COOKE
President, California Police Chiefs Association

Rebuttal to Argument in Favor of Proposition 51

Proposition 51 will *NOT* lower taxes, will *NOT* lower insurance rates and will *NOT* make insurance more available.

Proposition 51 is a fraud promoted by the insurance industry, chemical manufacturers, and local government officials.

Insurance companies back Proposition 51 because they want to increase their profits-they don't want to pay the claims they owe.

Toxic chemical producers back Proposition 51 because they want to increase their profits-they don't want to be held responsible for the cancer their toxic waste dumps cause.

Local government officials back Proposition 51 because they don't want to do the job we taxpayers elected them to do-protecting the people by maintaining efficient police and fire services and safe roads.

Proposition 51 will NOT reduce taxes. This insurance company windfall won't go to you.

If Proposition 51 passes, *our welfare rolls will increase.* People who must spend their life in a wheelchair or on a respirator will NOT be compensated by those who caused their injuries-they will be forced to go on welfare.

The insurance crisis is caused by a greedy insurance industry that is exempted from federal antitrust laws. There is no rate competition and thus no need to pass savings on to us.

Ralph Nader says,

"The insurance industry is using its current massive premium gouging and arbitrary cancellations as a political battering ram to further bloat profits."

When was the last time your insurance company lowered your rates?

NO on Proposition 51-Protect your rights.

PAT CODY
DES Action

JAMES E. VERMEULEN
Founder and Executive Director

Asbestos Victims of America

34 Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by any official agency P86 ***1246**

51. Multiple Defendants Tort Damage Liability: Initiative Statute

Argument Against Proposition 51

If you or a member of your family is paralyzed for life by a drunk driver California law now protects your right to full and fair compensation for your injuries. This initiative removes that protection.

Proposition 51 is an attempt by big insurance companies to avoid paying victims for the injuries they suffer. *Passage of this initiative does nothing to guarantee that your insurance rates will be lower or that insurance will be more available than it is today.*

Our present system of justice has developed over hundreds of years to achieve the twin goals of (*one*) full compensation if you are injured because of someone else's fault and (*two*) encouraging safe and responsible practices and products. Every day, juries made up of taxpayers and consumers just like you carry out these goals. They decide who is at fault and put the responsibility where it belongs: not on innocent victims, but on drunk drivers, manufacturers of dangerous products or toxic waste and unsafe roads and highways. Where juries have been clearly wrong, appellate courts have overturned the jury awards.

But insurance companies never tell you that.

The current system works and it's fair: Those who caused the injuries pay the victims. Though juries assign a percentage of fault to those responsible, it is the involvement of everyone found guilty that caused the accident to occur. It is *not* fair to make innocent victims-who are not at fault-bear the cost, while the guilty walk away.

The insurance companies want the present system scrapped. Insurance companies have manufactured a crisis by refusing to issue policies, even in cases where they have no claims and no losses. They point to large jury awards as the root of the problem. You should know that juries give nothing-not one dollar-in 50% of the medical malpractice and product liability cases they hear.

But the insurance companies never tell you that either.

Insurance companies refuse to promise that insurance rates will be lower or policies more available if this initiative passes. In fact, Kansas and Ohio have measures similar to this proposition, yet they are also faced with insurance "crises." Proposition 51 solves *nothing.* The only guarantee it offers is that you lose your legal rights to full and fair compensation.

The battle over Proposition 51 is more than a mud fight between insurance companies and lawyers. Every Californian has a stake in assuring that businesses and local governments behave in a safe, responsible manner, and that innocent people who are injured by dangerous products or unsafe conditions are fully and fairly compensated. These values should not be sacrificed in favor of insurance industry profits.

Don't be fooled by slick ads. Don't be tricked by big corporations into voting away your legal rights. If you want to assure your access to justice and your ability to be compensated when injured by reckless and unethical behavior, join us in voting NO on Proposition 51 on June 3rd.

DON'T GIVE AWAY YOUR RIGHTS. VOTE NO!
HARRY M. SNYDER
Regional Director, California Consumers Union of U.S., Inc.

Rebuttal to Argument Against Proposition 51

California *TAXPAYERS ARE THE VICTIMS* of the unfair "deep pocket" law-*TRIAL LAWYERS ARE THE REAL BENEFICIARIES.*

PROPOSITION 51 PROTECTS BOTH INJURED VICTIMS AND TAXPAYERS.

Injured victims will be FULLY COMPENSATED for *ALL* actual damages-present and future-medical bills, lost earnings and property damage. *VICTIMS' FAMILIES WILL NOT SUFFER FINANCIAL LOSS.*

Under Proposition 51:

Liability insurance, now virtually impossible to obtain, could again be made available to cities and counties.

Private sector commercial liability insurance premiums could drop 10- 15%, according to D. Michael Enfield, managing director of the world's largest insurance brokerage.

IT'S A FAIR COMPROMISE. That's why one of the largest coalitions ever is supporting Proposition 51, including:

County Supervisors Association of California

League of California Cities

California Taxpayers' Association

California State PTA

California Chamber of Commerce

California Police Chiefs Association

California Community College Trustees

California Peace Officers Association

California School Boards Association

California State Sheriffs' Association

Consumer Alert

California Medical Association

Service Employees International Union, Joint Council # 2

California Manufacturers Association

California Farm Bureau Federation

National Federation of Independent Business

California Dental Association

California District Attorneys Association

California Women for Agriculture

Zoological Society/San Diego

California Association of Recreation and Park Districts

Sierra Ski Areas Association

California Defense Counsel

Association for California Tort Reform

California Hospital Association

Associated General Contractors

California Restaurant Association

California Institute of Architects

Association of California School Administrators

Western United States Lifesaving Association

California Association of 4WD Clubs

All 58 COUNTIES, virtually EVERY CITY, and MANY MORE ORGANIZATIONS

(Legal limits prohibit a complete list.)

KIRK WEST
President, California Chamber of Commerce

PAT RUSSELL
President, League of California Cities

President, Los Angeles City Council

LESLIE BROWN
President, County Supervisors Association of California

Supervisor, Kings County

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Cal.,1988.

Evangelatos v. Superior Court (Van Waters & Rogers, Inc.)

END OF DOCUMENT

WAYNE L. FERDIG, Plaintiff and Appellant,
v.
STATE PERSONNEL BOARD et al., Defendant and Respondent.
Sac. No. 7823.

Supreme Court of California

May 8, 1969.

HEADNOTES

(1) Civil Service § 4.5--Veterans' Preferences.
A civil service applicant was not entitled to any veterans' preference credits under Gov. Code, § 18973, providing therefor and defining veteran, where his service in the merchant marine did not satisfy the statutory service requirement specified as essential for a veterans' preference.

Character of service or connection with military or naval service necessary to entitle one to benefit of veterans' preference statute in relation to civil service, note, 87 **A.L.R.** 1002. See also **Cal.Jur.2d,** Civil Service, § 14; **Am.Jur.2d,** Civil Service, § § 26, 27.

(2) Civil Service § 4.5--Veterans' Preferences.
In the context of civil service, authority to determine the allowance of veterans' preferences emanates from the California Constitution (Cal. Const., art. XXIV, § 7) and has been in turn conferred by the Legislature upon the Department of Veterans Affairs (Gov. Code, § 18976); the department is charged with the responsibility of notifying the State Personnel Board which candidates have qualified for veterans' preference and in carrying out this responsibility it must make its determination in accordance with the statute allowing additional credit to veterans (Gov. Code, § 18973), but the veteran has some responsibility in presenting proof of eligibility to the department (Gov. Code, § 18976).

(3a, 3b, 3c) Civil Service § 4.5--Veterans' Preferences.
The appointment of a state civil service applicant was void, and the State Personnel Board had jurisdiction to revoke it and to remove the appointee from ***97** his position, where his right to appointment was dependent on veterans' preference credits and the appointment had been made as a consequence of the applicant's erroneous representation to the Department of Veterans Affairs that he was a veteran when in fact he was not.

(4) Civil Service § 3--Constitutional and Statutory Provisions.
The action of the Department of Veterans' Affairs invoked by a request for veterans' preference credits is an integral part of the civil service system established by the People and implemented by the Legislature through the State Civil Service Act; the system is grounded on the constitutional mandate that permanent appointments and promotion in the state civil service shall be based upon merit, efficiency and fitness as ascertained by competitive examination; the Legislature has provided a detailed method of carrying out the constitutional mandate, so that appointments shall be based upon merit and fitness.

(5) Civil Service § 4.5--Veterans' Preferences.
Where a person on an eligible list claiming to be a veteran is not in fact a veteran, he is not entitled to receive veterans' preference credit, the Department of Veterans' Affairs is without power to certify that he is entitled, and the State Personnel Board is without power to allow such credits.

(6) Administrative Law § 37--Validity of Administrative Action--Compliance With Constitutional and Statutory Provisions.
Administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute; and an administrative agency must act within the powers conferred upon it by law and may not validly act in excess of such powers.

See **Cal.Jur.2d,** Administrative Law, § 63; **Am.Jur.2d,** Administrative Law, § 188.

(7) Civil Service § 1--State Personnel Board.
The State Personnel Board is a body of special and limited jurisdiction and has no powers except such as the law of its creation has given it.

(8) Civil Service § 3--Constitutional and Statutory Provisions.
The jurisdiction of the State Personnel Board, including its adjudicating power, is derived directly from Cal. Const., art. XXIV, § 3, which directs that the board shall administer and enforce the civil service laws, and its authority is governed by the Constitution as well as by the Civil Service Act.

See **Cal.Jur.2d,** Civil Service, § 5.

(9) Civil Service § 12(2)--Discharge, Demotion, Suspension and Dismissal-- Hearing--State Personnel

Board.

The State Personnel Board was ***98** within its power in entertaining a challenge to the legality of a civil service applicant's appointment, in holding a hearing and conducting an investigation on such complaint, and in rectifying the appointment which had been improperly and unlawfully, though in good faith, made based on unauthorized veterans' preference credits, where the board received the prompt and full cooperation of the Department of Veterans' Affairs which itself reexamined the applicant's eligibility for veterans' preference credits and removed them, where an objection was raised with the department only a month after the applicant's appointment, and an objection was made to the board approximately three months later, and where both agencies promptly reviewed the matter.

(10) Civil Service § 10--Discharge, Demotion, Suspension and Dismissal-- Grounds.

Gov. Code, § 19173, providing for rejection of probationers for certain deficiencies, was not intended to cure any defect in certification and appointment deriving from violation of the civil service statutes, and its provisions for rejection of a civil service appointee during a probationary period were inapposite, where the applicant's separation from a position to which he sought reinstatement was effectuated under the implied power of the State Personnel Board to rectify appointments made in violation of the civil service laws in appointing the applicant, who was qualified for the position in question by passing the examination, but not eligible to be certified for the position.

(11) Civil Service § 12(1)--Hearing--Time for Protest.

It was not necessary that a protestor of a civil service appointment file an "appeal" to the State Personnel Board within the time limits prescribed by its rules where the board, upon the matter being called to its attention, had jurisdiction to review and correct its initial action based on allowance of unauthorized veterans' preference credits by which a civil service applicant improperly secured eligibility for certification and appointment; and, in any event, the protest was timely made where 15 days thereafter the Department of Veterans' Affairs formally notified the personnel board that the applicant's veterans' preference had been "removed."

SUMMARY

APPEAL from a judgment of the Superior Court of Sacramento County. Mamoru Sakuma, Judge. Affirmed.

Proceeding in mandamus to compel the State Personnel Board to set aside its order revoking an appointment to a civil service position. Judgment denying writ affirmed.

COUNSEL

Walter W. Taylor for Plaintiff and Appellant. ***99**

Thomas C. Lynch, Attorney General, William M. Goode and Robert Burton, Deputy Attorneys General, and Harry T. Kaneko for Defendants and Respondents.

SULLIVAN, J.

This is an appeal from a judgment denying a writ of mandate to compel respondent State Personnel Board (Board) [FN1] to set aside and annul its order revoking the appointment of appellant Wayne L. Ferdig to a state civil service position, and to reinstate appellant in said position.

> FN1 Respondents named in the court below were the following: (a) The Board and members Joseph L. Wyatt, Jr., Robert S. Ash, May Layne Bonnell, Ford A. Chatters and Samuel Leask, Jr.; (b) Theodore J. Walas; Frederick Granberg and Murray J. Hunter, three individuals entitled to certification for the position involved on the alleged ground that appellant's certification was illegal; and (c) nine individuals ranking above appellant on the employment list on the alleged ground that the allowance of veterans' preference credits to appellant was illegal. The record discloses that only those named in (a) and (b) appeared in the court below. Respondents named in (a) have appeared in this court through the Attorney General; respondent Walas did not file a brief herein but appeared by counsel at oral argument; the other respondents have not appeared herein.

The facts are not in dispute and, as disclosed by the trial court's findings and the documents in the record, are as follows: On May 14, 1962, appellant was appointed to the class of Refrigeration Engineman with no veterans' preference requested or applied to his score. On March 12, 1963, he was transferred to the class of Office Building Engineer.

On July 20, 1963, appellant took an examination for class of Chief Engineer II in the Department of General Services and the employment list established on October 1, 1963, ranked him as number 16. On October 17, 1963, he applied to the Department of Veterans Affairs (Department) for a veterans' preference, presenting a certificate of discharge. This document was issued by the United States Naval Service and certified in substance that appellant, described therein as "Apprentice Seaman, Class M-1" had been honorably discharged from said service. It indicates on its face appellant's service in the United States Naval Reserve, as distinguished from the United States Navy; another document in the record refers to appellant's service as "war-time service in the merchant marine." As a result of said presentation, the Department of Veterans Affairs notified the Board that veterans' preference points were applicable to appellant's score, thereby moving appellant up to number 4 on the list.

As a result of a waiver by a person ahead of him, appellant then became one of the top three on the list and thus eligible ***100** for appointment. On August 24, 1964, he was appointed to the position of Chief Engineer II. Without the addition of veterans' points, he would not have been within the top three on the list.

On September 25, 1964, the question was raised with the Department of Veterans Affairs as to whether the application of veterans' preference points to appellant's case was proper. The Department then requested appellant to resubmit the documents supporting his claim therefor. On November 9, 1964, approximately nine weeks after appellant's appointment to the position, the Department advised appellant that his application for the points had been approved erroneously. Appellant objected to this determination and the Departent directed an inquiry to the appropriate federal agency as to whether appellant's service and training in the Naval Service was considered active duty in the armed forces of the United States.

On January 4, 1965, an officer of Local 411 of the Union of State Employees, by letter to the Board, questioned the legality of appellant's appointment as Chief Engineer II. Shortly thereafter the Judge Advocate of the Department of the Navy advised the Department of Veterans affairs that appellant had performed no active duty or other active naval service. The latter Department thereupon notified both appellant and the Board that it had removed appellant's veterans' preference. On April 9, 1965, the Board, after a hearing, made its order revoking appellant's appointment "from the beginning."

The trial court, concluding that the Board had acted lawfully, denied appellant's petition for a peremptory writ of mandate and discharged the alternative writ theretofore issued. This appeal followed.

Appellant makes no claim before us that he is, or ever was, a veteran as that term is used in Government Code section 18973 [FN2] which provides for additional credits for veterans attaining passing marks in specified examinations. Essentially he advances two contentions: First, that the jurisdiction of the Board to remove civil service employees is expressly limited by statute and appellant's removal was not authorized by any statute; and second, that although the Board's action in crediting him with veterans' preference points was erroneous, ***101** it had nevertheless become final and the Board was without jurisdiction to reconsider or correct it.

FN2 Hereafter, unless otherwise indicated, all section references are to the Government Code.

We turn first to the circumstances of appellant's appointment. The record before us establishes without any contradiction that appellant was not entitled at any time to the veterans preference points which advanced him from number 16 to number 4 and eventually to number 3 on the list, and thereby made him eligible for appointment.

(1) Section 18973 at the times here material provided that in certain examinations "a veteran with 30 days or more of service" who becomes "eligible for certification from eligible lists by attaining the passing mark established for the examination" shall be allowed specified additional points. The statute further provided: "For the purpose of this section, 'veteran' means any person who has served full time for 30 days or more in the armed forces in time of war or in time of peace in a campaign or expedition for service in which a medal has been authorized by the Government of the United States, or during the period September 16, 1940, to December 6, 1941, inclusive, or during the period June 27, 1950, to January 31, 1955, and who has been discharged or released under conditions other than dishonorable, ..." [FN3]

FN3 Section 18973 underwent minor revisions in 1967 and 1968 which are not

material in the present case.

(2) Appellant was not a "veteran" within the meaning of the above statute. His service in the merchant marine did not satisfy the statutory service requirements specified as essential for a veterans' preference. The plain fact of the matter is that appellant was not entitled to any veterans' preference credits. Indeed, appellant himself seems to concede all this.

Authority to determine the allowance of veterans' preferences emanates from the California Constitution [FN4] and has been in turn conferred by the Legislature upon the Department of Veterans Affairs. (§ 18976.) [FN5] The Department is thus ***102** charged with the responsibility of notifying the State Personnel Board which candidates have qualified for veterans' preference. We think it is clear that in carrying out this responsibility the Department must make its determination in accordance with the statute allowing the additional credits. (§ 18973; see fn. 3, *ante*.)

FN4 Section 7 (entitled "Veterans' Preferences") of article XXIV (entitled "State Civil Service") of the California Constitution provides: "Nothing herein contained shall prevent or modify the giving of preferences in appointments and promotions in the State civil service to veterans and widows of veterans as is now or hereafter may be authorized by the Legislature."

FN5 Section 18976 provides: "Request for and proof of eligibility for veterans' preference credits shall be submitted by the veteran to the Department of Veterans Affairs. The procedures and time of filing such request shall be subject to rules promulgated by the Department of Veterans Affairs. After the State Personnel Board certifies that all parts of an examination have been completed and the relative standings of candidates are ready to be computed the Department of Veterans Affairs shall notify the State Personnel Board which candidates have qualified for veteran preference credits on the examination."

But the veteran himself has some responsibility in these matters. Under section 18976: "Request for and *proof of eligibility for veterans' preference credits* shall be submitted *by the veteran* to the Department of Veterans' Affairs." (§ 18976). (Italics added.) In the instant case, appellant's application for veterans' preference made on an official form of the Department is before us. At the top of the document in large bold type appears the following: "Instructions and Eligibility Requirements Are Listed on the Back of This Application." The reverse of the document contains, among other things, an explicit statement of the eligibility requirements in accordance with the language of section 18973. [FN6] Immediately above appellant's signature on the face of the application appears the following: "Signature: I Hereby Certify that I am eligible for veterans' preference and that the statements on this application are true, and I agree and understand that any misrepresentation of material facts herein may cause forfeiture of all right to any employment in the service of the State of California."

FN6 For example the first sentence reads in pertinent part as follows: "Only veterans with active service in the *armed forces* of the United States *in time of war*, or in time of peace in a campaign or expedition for service in which a medal has been authorized by the Government of the United States ... may receive a 10-point preference on State of California civil service examination ...." (Italics added.)

(3a) In sum, not only was the allowance of a veteran's preference to appellant unauthorized because he was at no time a veteran; it was also made as a consequence of appellant's erroneous representation to the Department that he was a veteran, when in fact he was not. Although appellant's representation may have been made in good faith and the Department's action may be characterized as a mistake, nevertheless the fact remains that the Department notified the Board that appellant was a candidate who qualified for veterans' preference credits on the examination (§ 18976) when in fact he did not.

(4) The action of the Department which appellant invoked by his request for veterans' preference credits was an integral ***103** part of the civil service system established by the people (Cal. Const., art. XXIV; see *Boren v. State Personnel Board* (1951) 37 Cal.2d 634, 639 [234 P.2d 981]) and implemented by the Legislature through the State Civil Service Act (Act) (§ § 18500-19765). This system is grounded upon the constitutional mandate that permanent appointments and promotion in the state civil service shall be "based upon merit, efficiency and fitness as

ascertained by competitive examination." (Cal. Const., art. XXIV, § 1; see Gov. Code, § § 18500, 18930, 18950). The Act provides a detailed method of carrying out this mandate (§ 18500, subds. (a) and (c)) so that among other objectives, appointments shall be based upon merit and fitness (§ 18500, subd. (c) (2)) and state civil service employment can be made a career. (§ 18500, subd. (c) (3).) It is manifest from an examination of the Act that the Legislature has taken great pains to prescribe exactly how appointment to state civil service positions is to be made. (See for example § § 18532, 18900, 18950, 19052.) This finds emphatic confirmation in section 19050: "The appointing power in all cases not excepted or exempted by virtue of the provisions of Article XXIV of the Constitution shall fill positions by appointment, including cases of transfers, reinstatements, promotions and demotions, in strict accordance with this part and the rules prescribed from time to time hereunder, *and not otherwise.* Except as provided in this part, appointments to vacant positions shall be made from employment lists." (Italics added.)

(5) Viewing in this context the provisions of the Act dealing with veterans' preferences, we have no hesitancy in concluding that where, as in the instant case, a person on an eligible list claiming to be a veteran is not in fact a veteran, he is not entitled to receive veterans' preference credits, the Department of Veterans Affairs is without power to certify that he is entitled, and the State Personnel Board is without power to allow such credits.

(6) It is settled principle that administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute. (*United States Fid. & Guar. Co. v. Superior Court* (1931) 214 Cal. 468, 471 [6 P.2d 243]; *Pacific Employers Ins. Co. v. French* (1931) 212 Cal. 139, 141-142 [298 P. 23]; *Grigsby v. King* (1927) 202 Cal. 299, 304 [260 P. 789]; *Garvin v. Chambers* (1924) 195 Cal. 212, 220- 223 [232 P. 696]; *Motor Transit Co. v. Railroad Com.* (1922) 189 Cal. 573, 577 [209 P. 586]; see ***104***Pacific Tel. & Tel. Co. v. Public Utilities Com.* (1950) 34 Cal.2d 822 [215 P.2d 441]; *State Comp. Ins. Fund v. Industrial Acc. Com.* (1942) 20 Cal.2d 264, 266 [125 P.2d 42]; *Allen v. McKinley* (1941) 18 Cal.2d 697, 705 [117 P.2d 342]; 1 Am.Jur.2d Administrative Law, § 70, p. 866.) An administrative agency, therefore, must act within the powers conferred upon it by law and may not validly act in excess of such powers. (See cases cited immediately above; see 2 Am.Jur.2d, Administrative Law, § 188, pp. 21-22.) (3b) In accordance with these principles, it has been held in this state, in matters pertaining to civil service and in other contexts, that when an administrative agency acts in excess of, or in violation, of the powers conferred upon it, its action thus taken is void. (See *Aylward v. State Board of Chiropractic Examiners* (1948) 31 Cal.2d 833, 839 [192 P.2d 929]; *Patten v. California State Personnel Board* (1951) 106 Cal.App.2d 168, 172-175 [234 P.2d 987]; *Pinion v. State Personnel Board* (1938) 29 Cal.App.2d 314, 319 [84 P.2d 185]; *Campbell v. City of Los Angeles* (1941) 47 Cal.App.2d 310, 313 [117 P.2d 901].) To hold otherwise in the case before us would be to frustrate the purpose of the civil service system.

Having concluded that appellant was not entitled to the appointment in the first place and that his appointment was void, we proceed to determine whether the Board had jurisdiction to revoke his appointment "from the beginning" and to remove him from his position. As we have already pointed out, appellant attacks such action on two broad grounds: First, he argues, the jurisdiction of the Board is expressly limited by statute and no statute authorizes his removal; secondly, since at the time of his removal he had already performed efficient service for more than the six months' probationary period, he had become a permanent employee and his appointment had become final.

Appellant's first argument is launched from section 19500 [FN7] which deals with the tenure of permanent employees and their separation from state civil service. The gist of the argument is that none of the methods of separation delineated in section 19500 apply in the instant case, and that since the Legislature ***105** has designated these methods of separation, it has of necessity excluded all others. The argument is misconceived and indeed ignores the circumstances of the problem before us. We are obviously not dealing with any of the situations covered by section 19500; nor are we dealing with a removal for cause based on any of the causes for discipline specified in section 19572.

> FN7 Section 19500 provides: "The tenure of every permanent employee holding a position is during good behavior. Any such employee may be temporarily separated from the State civil service through layoff, leave of absence, or suspension, permanently separated through resignation or removal for cause, or permanently or temporarily separated through retirement *or terminated for medical reasons under the*

> *provisions of Section 19253.5."*
> Section 19253.5 makes provision for a medical examination of an employee for purposes of evaluating his capacity to perform his duties.

What we examine here is the jurisdiction of the Board to take corrective action with respect to an appointment which it lacked authority to make. It defies logic to say that the mere enumeration in the Act of the methods of separating an employee from state civil service in a situation where an appointment has been validly made, compels the conclusion that no jurisdiction exists to rectify the action of the Board in a situation where an appointment has been made without authority.

(7) It is true, as appellant argues, that the "State Personnel Board is a body of special and limited jurisdiction [and] ... has no powers except such as the law of its creation has given it." (*Conover v. Board of Equalization* (1941) 44 Cal.App.2d 283, 287 [112 P.2d 341].) (8) But article XXIV, section 3 of the California Constitution directs that the Board "shall administer and enforce" the civil service laws. The jurisdiction of the Board, including its adjudicating power is derived directly from this section. (*Boren v. State Personnel Board, supra*, 37 Cal.2d 634, 637-638; *Neely v. California State Personnel Board* (1965) 237 Cal.App.2d 487, 488-489 [47 Cal.Rptr. 64]) and the Board's authority is governed by the Constitution as well as by the Civil Service Act. (*Boren v. State Personnel Board, supra*, 37 Cal.2d 634, 640- 641.)

Additionally we note that the Act provides in section 18670: "The board may hold hearings and make investigations *concerning all matters relating to the enforcement and effect of this part* and rules prescribed hereunder. It may inspect any State institution, office, or other place of employment affected by this part to *ascertain whether this part and the board rules are obeyed.*

"The board shall make investigations and hold hearings at the direction of the Governor or the Legislature or upon the petition of an employee or a citizen *concerning the enforcement and effect of this part and to enforce the observance of the provisions of Article XXIV of the Constitution and of this part* and the rules made hereunder." (Italics added.)

The provisions of the Constitution and of the Act to which ***106** we have just referred, considered in the light of the purpose, objective and entire scheme of the civil service system, convince us that in the matter here under review the Board was invested with the power, and, indeed, charged with the duty, to "administer and enforce" the applicable sections dealing with veterans' preference credits. (§ § 18973, 18976; see text accompanying fn. 3, *ante*; see fn. 5, *ante*.) Thus, after having been notified by the Department of Veterans Affairs which candidates had qualified for veterans' preference credits (§ 18976), it was the duty of the Board to apply such credit (§ 18974) and eventually to certify the three highest names on the eligible list to the appointing power. (§ 19057.) Essentially and in the final analysis, it was the Board which was charged with the responsibility of coordinating all of the procedures of the Act to the end of certifying only those persons who were lawfully entitled to the position. [FN8] In this constitutional and legislative scheme, a determination made by the Department contrary to the provisions of the Act, albeit in good faith, as to qualification for veterans' preference credits could not be conclusive upon the Board. If this were so, the Board's power to administer and enforce the Act would be eroded and that body would be compelled to certify for appointment persons who were in fact not entitled to the position.

> FN8 We emphasize that the determination of eligibility for veterans' preference credits is only one step in a procedure designed to have promotions and appointments based upon merit, efficiency and fitness. To accomplish this objective, the Board is charged, inter alia, with the responsibility of administering competitive examinations (§ 18930), setting passing grades (§ 18937), determining each competitor's earned rating (§ 18936), modifying these ratings by applying veterans' preference points (§ 18974), preparing eligible lists of those persons who may be lawfully appointed to any position within the class for which the examination is held (§ 18900), and certifying the three highest names to the appointing power. (§ 19057.)

(3c) We conclude, therefore, that when the matter was brought to its attention, the Board had jurisdiction to inquire into and review the certification as to veterans' preference credits made by the Department of Veterans Affairs and having determined that appellant was not entitled to such credits, to take the corrective action which it did by revoking appellant's appointment. While this jurisdiction does not appear to have been conferred

upon the Board in so many words by the express or precise language of constitutional or statutory provision, there can be no question that it is implicit in the constitutional and statutory scheme which empowers the Board to administer and enforce the civil service laws. ***107**

(9) We are satisfied that the Board was well within its power in entertaining the challenge made to the legality of appellant's appointment, in holding a hearing and conducting an investigation on such complaint, and in rectifying the appointment which had been improperly and unlawfully made, although made in good faith. In this, as we have already pointed out, the Board apparently received the prompt and full cooperation of the Department of Veterans Affairs which itself reexamined appellant's eligibility for veterans' preference credits and removed the preference. In the light of this background-an objection raised with the Department only a month after appellant's appointment, an objection made to the Board approximately three months later, and the prompt review of the matter by both agencies-appellant's insistent claim to an appointment to which he was not entitled in the first place, is exposed as utterly groundless. We can apprehend neither reason nor fairness in the position of appellant, who seemingly acknowledges that he was at no time a veteran within the terms of the statute but nevertheless insists that he should be permitted to retain the veteran's benefits to which he was never entitled.

We therefore reject appellant's arguments, first, that the Board having once made a good faith determination as to appellant's position on the list and having acted upon it, had no reserved power to annul its action; and second, that the appointment having once been accepted in good faith by appellant who performed efficiently in the position for the probationary period, could not be thereafter revoked by the Board.

As to the first argument, we have already explained why the Board had jurisdiction to review the matter and to take the corrective action it did. Our conclusions on this point are consistent with California precedents. In the cases already cited exemplifying the principle that appointments in violation of the civil service laws are void, it was recognized that the appropriate board had jurisdiction to correct the unlawful action taken. In *Campbell v. City of Los Angeles, supra*, 47 Cal.App.2d 310, mandate was denied to compel reinstatement of a civil service employee who had been reappointed after having been illegally restored to the eligibility list by the civil service commission and was subsequently discharged on the ground that since his restoration to the list was illegal, his appointment was illegal. Although the discharge seems to have been initially made by the department head, it was ***108** passed upon and sustained by the civil service commission. In *Pinion v. State Personnel Board, supra*, 29 Cal.App.2d 314, the court denied mandate to compel the Board to recognize the petitioners, who had permanent status under civil service, as properly holding certain civil service positions although they had been actually certified for only a class of junior positions. It was there said: "The only positions lawfully held by these petitioners are those for which they were examined and to which they were certified and appointed in the manner provided by law." (29 Cal.App.2d at p. 318.) In *Aylward v. State Board of Chiropractic Examiners, supra*, 31 Cal.2d 833, 839, we said: "Implicit in the cases denying a board's power to review or reexamine a question, however, is the qualification that the board must have acted within its jurisdiction and within the powers conferred on it. Where a board's order is not based upon a determination of fact, but upon an erroneous conclusion of law, and is without the board's authority, the order is clearly void and hence subject to collateral attack, and there is no good reason for holding the order binding on the board. Not only will a court refuse to grant mandate to enforce a void order of such a board [citations], but mandate will lie to compel the board to nullify or rescind its void acts. [Citation.] While a board may have exhausted its power to act when it has proceeded within its powers, it cannot be said to have exhausted its power by doing an act which it had no power to do or by making a determination without sufficient evidence. In such a case, the power to act legally has not been exercised, the doing of the void act is a nullity, and the board still has unexercised power to proceed within its jurisdiction." [FN9]

> FN9 Strangely enough, appellant while challenging the jurisdiction of the Board to take corrective action in the case before us, appears to recognize the inherent inequity of his position and goes out of his way to inform us that he is *not* arguing that a court, rather than the Board, "could not ... have removed [him] from his position pursuant to its general equity jurisdiction."

(10) Appellant's second argument, namely, that his appointment could not be revoked after the expiration of a six months' probationary period, is also without

merit. Section 19173 provides: "Any probationer may be rejected by the appointing power during the probationary period for reasons relating to the probationer's qualifications, the good of the service, or failure to demonstrate merit, efficiency, fitness, and moral responsibility. ..." Here, appellant was qualified for the position in question because he passed the examination, but he was not eligible to be certified for it; it is not disputed that he ***109** performed satisfactorily up to the time of his dismissal. Therefore, none of the grounds provided in section 19173 were available to the appointing power (Department of General Services) or the Board to dismiss appellant during his probationary period. Nor was section 19173 intended to cure any defect in certification and appointment deriving from violation of the civil service statutes. Appellant's separation from the position to which he now seeks reinstatement was effectuated under the implied power of the Board to rectify appointments made in violation of the civil service laws. For this reason, provisions for rejection during the probationary period are inapposite here.

It is convenient at this point to observe that *after* the occurrence of the events here involved and *after* the decision of the Court of Appeal in this case, the Legislature at its 1968 regular session enacted Government Code section 19257.5 which provides: "Where the appointment of an employee has been made and accepted in good faith, but where such appointment would not have been made but for some mistake of law or fact which if known to the parties would have rendered the appointment unlawful when made, the board may declare the appointment void from the beginning *if such action is taken within one year after the appointment.*" (Italics added.) (Added by Stats. 1968, ch. 500, § 1; in effect November 13, 1968.) The above section is of course not applicable to the case at bench. We wish to make clear, nevertheless, that our views and holdings in the instant case apply to a situation arising before the enactment of the statute and should not be deemed as derogating from, or otherwise affecting the proper operative effect of, the above statute, particularly the last clause thereof.

(11) Finally, appellant contends that the Board by its own rules was divested of jurisdiction "to accept the appeal" or to take action on April 9, 1965. The point of this argument is that appellant's appointment was made on August 24, 1964. and under the Board's rule 64 "every appeal shall be filed with the board ... within 30 days after the event happened upon which the appeal is based. Upon good cause being shown the board ... may allow such an appeal to be filed within 30 days after the end of the period in which the appeal should have been filed." Therefore, argues appellant, the protest made by the officer of the union on January 4, 1965, was an untimely appeal.

There are two answers. Assuming, that the above rules ***110** governed, we think that any "appeal" to the Board was timely made after the Department of Veterans Affairs on January 19, 1965, formally notified the Board that appellant's veterans' preference had been "removed." Second, and more importantly, we do not believe that it was necesary to file an "appeal" to the Board, which, upon the matter being called to its attention, clearly had jurisdiction to review and correct the initial action taken.

The judgment is affirmed.

Traynor, C. J., McComb, J., Peters, J., Tobriner, J., Mosk, J., and Burke, J., concurred.

Cal.,1969.

Ferdig v. State Personnel Bd.

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15 Cal.4th 232
15 Cal.4th 232, 933 P.2d 507, 62 Cal.Rptr.2d 243, 32 UCC Rep.Serv.2d 534, 97 Cal. Daily Op. Serv. 2554, 97 Daily Journal D.A.R. 4507
(Cite as: 15 Cal.4th 232)

Supreme Court of California
WESTERN SECURITY BANK, N.A., Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
BEVERLY HILLS BUSINESS BANK et al., Real Parties in Interest. VISTA PLACE ASSOCIATES et al., Petitioners,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; WESTERN SECURITY BANK,
N.A., et al., Real Parties in Interest.
No. S037504.

Apr 7, 1997.

SUMMARY

After a partnership went into default on a loan it had obtained from a bank, the bank and the partnership modified the terms of the loan, and the general partners obtained unconditional, irrevocable standby letters of credit in favor of the bank as additional collateral. When the partnership again went into default, the bank foreclosed nonjudicially on the real property securing the loan and then presented the letters of credit to the issuer so as to cover the unpaid deficiency. The issuer brought an action for declaratory relief, seeking a declaration that it was not obligated to accept or honor the bank's tender of the letters of credit or, alternatively, a declaration that, if it was required to honor the letters, the partners were obligated to reimburse the issuer. The trial court entered a judgment decreeing that the issuer was required to honor the letters of credit and that the issuer was not barred from severally seeking reimbursement from the partners. (Superior Court of Los Angeles County, No. BC031239, Ernest George Williams, Judge.) The Court of Appeal, Second Dist., Div. Three, No. B066488, reversed, concluding that, under Code Civ. Proc., § 580d, part of the antideficiency law, the issuer of a standby letter of credit, provided to a real property lender by a debtor as additional security, may decline to honor it after receiving notice that it is to be used to discharge a deficiency following the beneficiary-lender's nonjudicial foreclosure on real property. Thereafter, the Legislature enacted urgency legislation (Sen. Bill No. 1612), providing that an otherwise conforming draw on a letter of credit does not contravene the antideficiency laws and that those laws afford no basis for refusal to honor a draw (Code Civ. Proc., § 580.5). After the Supreme Court granted review and returned the matter to the Court of Appeal for reconsideration in light of the urgency legislation, the Court of Appeal concluded the legislation constituted a substantial change in existing law and thus was prospective only and had no impact on the Court of Appeal's earlier conclusions regarding the parties' rights and obligations. ***233**

The Supreme Court reversed the judgment of the Court of Appeal and remanded. The court held that the Court of Appeal erred in concluding that the enactment of Sen. Bill No. 1612 had no effect on this case. The Legislature explicitly intended to abrogate the Court of Appeal's prior decision to clarify the parties' obligations when letters of credit support loans also secured by real property. The Court of Appeal mistook standby letters of credit for an attempt to evade the antideficiency and foreclosure laws by seeing them only as a form of guaranty, and also overlooked that the parties specifically intended the standby letters of credit to be additional security. When viewed as additional security for a note also secured by real property, a standby letter of credit does not conflict with the statutory prohibition of deficiency judgments. Further, the Legislature manifestly intended the respective obligations of the parties to a letter of credit transaction to remain unaffected by the antideficiency laws, whether those obligations arose before or after enactment of Sen. Bill No. 1612. Since the Legislature's action constituted a clarification of the state of the law before the Court of Appeal's decision, rather than a change in the law, the legislation had no impermissible retroactive consequences, and it governed this case. (Opinion by Chin, J., with George, C. J., Baxter, and Brown, JJ., concurring. Concurring and dissenting opinion by Werdegar, J. Concurring and dissenting opinion by Mosk, J., with Kennard, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Letters of Credit § 10--Duties and

Privileges of Issuer--Letters Presented to Cover Deficiency--Following Nonjudicial Foreclosure--Retroactivity of New Legislation.

In an action brought by the issuer of letters of credit against a bank that had loaned money to a partnership secured by real property, and against the partnership and its general partners, the Court of Appeal erred in concluding that the Legislature's postjudgment enactment of urgency legislation (Sen. Bill No. 1612), providing that an otherwise conforming draw on a letter of credit does not contravene the antideficiency laws and that those laws afford no basis for refusal to honor a draw (Code Civ. Proc., § 580.5), had no effect on a prior Court of Appeal holding in this case to the effect that, under Code Civ. Proc., § 580d, the issuer of a standby letter of credit, provided to a real property lender by a debtor as additional security, may decline to honor it after receiving notice that it is to be used to discharge a deficiency following the beneficiary-lender's nonjudicial foreclosure on real property. The partners obtained the letters ***234** of credit as additional collateral for repayment of the loan and presented the letters for payment to the issuer after the bank foreclosed nonjudicially on the real property. The Legislature explicitly intended to abrogate the Court of Appeal's prior decision to clarify the parties' obligations when letters of credit support loans also secured by real property. The Court of Appeal mistook standby letters of credit for an attempt to evade the antideficiency and foreclosure laws by seeing them only as a form of guaranty, and also overlooked that the parties specifically intended the standby letters of credit to be additional security. When viewed as additional security for a note also secured by real property, a standby letter of credit does not conflict with the statutory prohibition of deficiency judgments. Further, the Legislature manifestly intended the respective obligations of the parties to a letter of credit transaction to remain unaffected by the antideficiency laws, whether those obligations arose before or after enactment of Sen. Bill No. 1612. Since the Legislature's action constituted a clarification of the state of the law before the Court of Appeal's decision, rather than a change in the law, the legislation had no impermissible retroactive consequences, and it governed this case.

[See 3 Witkin, Summary of Cal. Law (9th ed. 1987) Negotiable Instruments, § 11.]

(2) Statutes § 5--Operation and Effect--Retroactivity.

Statutes do not operate retrospectively unless the Legislature plainly intended them to do so. A statute has retrospective effect when it substantially changes the legal consequences of past events. A statute does not operate retrospectively simply because its application depends on facts or conditions existing before its enactment. When the Legislature clearly intends a statute to operate retrospectively, the courts are obliged to carry out that intent unless due process considerations prevent them from doing so.

(3) Statutes § 5--Operation and Effect--Retroactivity--Amendments-- Purpose--Change in Law or Clarification.

A statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment. The courts assume that the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. The courts' consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning. Such a legislative act has no retrospective effect because the true meaning of the statute remains the ***235** same. One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation. An amendment that in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute. In such a case, the amendment may logically be regarded as a legislative interpretation of the original act-a formal change-rebutting the presumption of substantial change. Even so, a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power that the Constitution assigns to the courts.

(4) Statutes § 5--Operation and Effect--Retroactivity--Legislative Intent-- Change in Law or Clarification.

A subsequent expression of the Legislature as to the intent of a prior statute, although not binding on the court, may properly be used in determining the effect of a prior act. Moreover, even if the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a clarification, the declaration of intent may still effectively reflect the Legislature's purpose to

achieve a retrospective change. Whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question for the legislative body enacting the statute. Thus, where a statute provides that it clarifies or declares existing law, such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, the court must give effect to this intention unless there is some constitutional objection to it.

(5) Letters of Credit § 10--Duties and Privileges of Issuer--Independence Principle.
The liability of the issuer of a letter of credit to the letter's beneficiary is direct and independent of the underlying transaction between the beneficiary and the issuer's customer. Under the independence principle, a letter of credit is an independent obligation of the issuing bank rather than a form of guaranty or a surety obligation (Cal. U. Com. Code, § 5114, subd. (1)). Thus, the issuer of a letter of credit cannot refuse to pay based on extraneous defenses that might have been available to its customer. Absent fraud, the issuer must pay upon proper presentment, regardless of any defenses the customer may have against the beneficiary based in the underlying transaction.

(6) Letters of Credit § 10--Duties and Privileges of Issuer--Independence Principle--Effect of Draw on Letter of Credit.
A standby ***236** letter of credit is a security device created at the request of the customer/debtor that is an obligation owed independently by the issuing bank to the beneficiary/creditor. A creditor that draws on a letter of credit does no more than call on all of the security pledged for the debt. When it does so, it does not violate the prohibition of deficiency judgments.

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CHIN, J.

This case concerns the extent to which two disparate bodies of law interact when standby letters of credit are used as additional support for ***237** loan obligations secured by real property. On one side we have California's complex web of foreclosure and antideficiency laws that circumscribe enforcement of obligations secured by interests in real property. On the other side is the letter of credit law's "independence principle," the unique characteristic of letters of credit essential to their commercial utility.

The antideficiency statute invoked in this case is Code of Civil Procedure section 580d. That section precludes a judgment for any loan balance left unpaid after the lender's nonjudicial foreclosure under a power of sale in a deed of trust or mortgage on real property. (See *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 43-44 [27 Cal.Rptr. 873, 378 P.2d 97].) [FN1] The independence principle, in summary form, makes the letter of credit issuer's obligation to pay a draw conforming to the letter's terms completely separate from, and not contingent on, any underlying contract between the issuer's customer and the letter's beneficiary. (See, e.g., Cal. U. Com. Code, § 5114, subd. (1); *San Diego Gas & Electric Co. v. Bank*

Leumi (1996) 42 Cal.App.4th 928, 933-934 [50 Cal.Rptr.2d 20].) [FN2]

FN1 In pertinent part, Code of Civil Procedure section 580d provides: "No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property or an estate for years therein hereafter executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust."

FN2 In 1996, the Legislature completely revised division 5 of the California Uniform Commercial Code, which pertains to letters of credit. (Stats. 1996, ch. 176.) The enactment of chapter 176 repealed the former division 5 and added a new division 5. (Stats. 1996, ch. 176, § § 6, 7.) The new provisions apply to letters of credit issued after the statute's effective date. (Stats. 1996, ch. 176, § 14.) Letters of credit issued earlier are to be dealt with as though the repeal had not occurred. (Stats. 1996, ch. 176, § 15.) We have no occasion in this case to consider the provisions of the new division 5.
The Legislature (Stats. 1996, ch. 497, § 7) later amended a statutory reference found in California Uniform Commercial Code section 5114 as it existed before chapter 176 was enacted. This second legislative action might appear to restore the prior section 5114 from the repealed former division 5 and possibly leave two sections numbered 5114 in the new division 5. (See Cal. Const., art. IV, § 9; Gov. Code, § 9605.) We have no occasion in this case to address the meaning or effect of this seeming incongruity either.
All references to section 5114 in this opinion are to California Uniform Commercial Code section 5114 as it existed before the 1996 legislation.

The Court of Appeal perceived a conflict between the public policies behind Code of Civil Procedure section 580d and the independence principle under the facts of this case. Here, after nonjudicial foreclosure of the real property security for its loan left a deficiency, the lender attempted to draw on the standby letters of credit of which it was the beneficiary. Ordinarily, the issuer's payment on a letter of credit would require the borrower to reimburse the issuer. (See § 5114, subd. (3).) The Court of Appeal considered that this result indirectly imposed on the borrower the equivalent of a ***238** prohibited deficiency judgment. The court concluded the situation amounted to a "fraud in the transaction" under section 5114, subdivision (2)(b), one of the limited circumstances justifying an issuer's refusal to honor its letter of credit.

The Legislature soon acted to express a clear, contrary intent. It passed Senate Bill No. 1612 (1993-1994 Reg. Sess.) (hereafter Senate Bill No. 1612) as an urgency measure specifically meant to abrogate the Court of Appeal's holding. (Stats. 1994, ch. 611, § § 5, 6.) In brief, the aspects of Senate Bill No. 1612 we address provided that an otherwise conforming draw on a letter of credit does not contravene the antideficiency laws and that those laws afford no basis for refusal to honor a draw. After the Legislature's action, we returned the case to the Court of Appeal for reconsideration in light of the statutory changes. On considering the point, the Court of Appeal concluded the Legislature's action was prospective only and had no impact on the court's earlier analysis of the parties' rights and obligations. Accordingly, the Court of Appeal reiterated its former conclusions.

We again granted review and now reverse. The Legislature's manifest intent was that Senate Bill No. 1612's provisions, with one exception not involved here, would apply to all existing loans secured by real property and supported by outstanding letters of credit. We conclude the Legislature's action constituted a clarification of the state of the law before the Court of Appeal's decision. The legislation therefore has no impermissible retroactive consequences, and we must give it the effect the Legislature intended.

I. Factual and Procedural Background

On October 10, 1984, Beverly Hills Savings and Loan Association, later known as Beverly Hills Business Bank (the Bank), loaned $3,250,000 to Vista Place Associates (Vista), a limited partnership, to finance the purchase of real property improved with a shopping center. Vista's general partners, Phillip F. Kennedy, Jr., John R. Bradley, and Peter M. Hillman (the Vista partners), each signed the promissory note. The loan transaction created a "purchase money mortgage," as it was secured by a "Deed of Trust and Assignment of Rents" as well as a

letter of credit.

Vista later experienced financial difficulties, and the loan went into default. Vista asked the Bank to modify the loan's terms so Vista could continue operating the shopping center and repay the debt. The Bank and Vista agreed to a loan modification in February 1987, under which the three Vista partners each obtained an unconditional, irrevocable standby letter of ***239** credit in favor of the Bank in the amount of $125,000, for a total of $375,000. These were delivered to the Bank as additional collateral security for repayment of the loan. Under the modification agreement, the Bank was entitled to draw on the letters of credit if Vista defaulted or failed to pay the loan in full at maturity.

Western Security Bank, N.A. (Western) issued the letters of credit at the Vista partners' request. Each partner agreed to reimburse Western if it ever had to honor the letters. Under the agreement, each Vista partner gave Western a $125,000 promissory note. [FN3]

> FN3 The parties' arrangements reflected a common use of letters of credit. A letter of credit typically is an engagement by a financial institution (the issuer), made at the request of a customer (also referred to as the applicant or account party) to pay a specified sum of money to another person (the beneficiary) upon compliance with the conditions for payment stated in the letter of credit, i. e., presentation of the documents specified in the letter of credit. (See Gregora, *Letters of Credit in Real Property Finance Transactions* (Spring 1991) 9 Cal. Real Prop. J. 1, 1- 2.)
> A letter of credit transaction involves at least three parties and three separate and independent relationships: (1) the relationship between the issuer and the beneficiary created by the letter of credit; (2) the relationship between the customer and the beneficiary created by a contract or promissory note, with the letter of credit securing the customer's obligations to the beneficiary under the contract or note; and (3) the relationship between the customer and the issuer created by a separate contract under which the issuer agrees to issue the letter of credit for a fee and the customer agrees to reimburse the issuer for any amounts paid out under the letter of credit. (Gregora, *Letters of Credit in Real Property Finance Transactions*, *supra*, 9 Cal. Real Prop. J. at p. 2; *San Diego Gas & Electric Co. v. Bank Leumi*, *supra*, 42 Cal.App.4th at pp. 932-933; see *Voest-Alpine Intern. Corp. v. Chase Manhattan Bank* (2d Cir. 1983) 707 F.2d 680, 682; and *Colorado Nat. Bank, etc. v. Bd. of County Com'rs* (Colo. 1981) 634 P.2d 32, 36-38, for a discussion of the history and structure of letter of credit transactions.)
> Letters of credit can function as payment mechanisms. For example, in sales transactions a letter of credit assures the seller of payment when parting with goods, while the conditions for payment specified in the letter of credit (often a third party's documentation, such as a bill of lading) assure the buyer the goods have been shipped before payment is made. (Gregora, *Letters of Credit in Real Property Finance Transactions*, *supra*, 9 Cal. Real Prop. J. at p. 3.) In the letter of credit's role as a payment mechanism, a payment demand occurs in the ordinary course of business and is consistent with full performance of the underlying obligations. (*Ibid.*)
> The use of letters of credit has now expanded beyond that function, and they are employed in many other types of transactions in which one party requires assurances the other party will perform. (Gregora, *Letters of Credit in Real Property Finance Transactions*, *supra*, 9 Cal. Real Prop. J. at p. 3.) When used to support a debtor's obligations under a promissory note or other debt instrument, the so-called "standby" letter of credit typically provides that the issuer will pay the creditor when the creditor gives the issuer written certification that the debtor has failed to pay the amount due under the debtor's underlying obligation to the creditor. (*Ibid.*) Thus, a payment demand under a standby letter of credit indicates that there is a problem-either the customer is in financial difficulty, or the beneficiary and the customer are in a dispute. (*Ibid.*)

In December 1990, the Bank declared Vista in default on the modified loan. The Bank recorded a notice of default on February 13, 1991, and began ***240** nonjudicial foreclosure proceedings. (Civ. Code, § 2924.) It then filed an action against Vista

seeking specific performance of the rents and profits provisions in the trust deed and appointment of a receiver.

On June 11, 1991, attorneys for the Bank and Vista signed a letter agreement settling the Bank's lawsuit. In that agreement, Vista promised it would "not take any legal action to prevent [the Bank's] drawing upon [the letters of credit] after the Trustee's Sale of the Vista Place Shopping Center, ... provided that the amount of the draw by [the Bank] does not exceed an amount equal to the difference between [Vista's] indebtedness and the successful bid of the Trustee's Sale." Vista promised as well not to take any draw-related legal action against the Bank after the Bank's draw on the letters of credit.

On June 13, 1991, the Bank concluded its nonjudicial foreclosure on the shopping center under the power of sale in its deed of trust. The Bank was the only bidder, and it purchased the property. The sale left an unpaid deficiency of $505,890.16.

That same day, the Bank delivered the three letters of credit and drafts to Western and demanded payment of their full amount, $375,000. The Bank never sought to recover the $505,890.16 deficiency from Vista or the Vista partners. About the time that Western received the Bank's draw demand, it also received a written notice from the Vista partners' attorney. The notice asserted that Code of Civil Procedure section 580d barred Western from seeking reimbursement from the Vista partners for any payment on the letters of credit, and that if Western paid, it did so at its own risk.

Western did not honor the Bank's demand for payment on the letters of credit. Instead, on June 24, 1991, Western filed this declaratory relief action against the Bank, as well as Vista and the Vista partners (collectively, the Vista defendants). Western's complaint sought: (1) a declaration that Western is not obligated to accept or honor the Bank's tender of the letters of credit; or, alternatively, (2) a declaration that, if Western must pay on the letters of credit, the Vista partners must reimburse Western according to the terms of their promissory notes.

The Vista defendants cross-complained against Western for cancellation of their promissory notes and for injunctive relief. In July 1991, the Bank filed a first amended cross-complaint, alleging Western wrongfully dishonored the letters of credit, and the Vista defendants breached the agreement not to take legal action to prevent the Bank's drawing on the letters of credit.

The Bank, Western, and the Vista defendants each sought summary judgment. After several hearings and discussions with counsel, which produced a stipulation on the key facts, the court issued its decision on January ***241** 23, 1992. By its minute order of that date, the court (l) denied the three motions for summary judgment, (2) severed the Vista defendants' cross-complaint against Western for cancellation of the promissory notes, (3) severed the Bank's amended cross-complaint against the Vista defendants for breach of the letter agreement, and (4) issued a tentative decision on the trial of Western's complaint for declaratory relief and the Bank's amended cross-complaint against Western for wrongful dishonor of the letters of credit.

The trial court signed and filed the judgment on March 26, l992. The court decreed the Bank was entitled to recover $375,000 from Western, plus interest at 10 percent from June 13, 1991, the date of the Bank's demand, and costs of suit. The court further decreed Western could seek reimbursement from the Vista partners severally, and each Vista partner was obligated to reimburse Western, pursuant to the promissory notes in favor of Western, for its payment to the Bank. Western appealed, and the Vista defendants cross-appealed.

The Court of Appeal, after granting rehearing and accepting briefing by several amici curiae, issued an opinion reversing the trial court on December 21, 1993. In that opinion, the court concluded: "We hold that, under section 580d of the Code of Civil Procedure, an integral part of California's long-established antideficiency legislation, the issuer of a standby letter of credit, provided to a real property lender by a debtor as additional security, *may* decline to honor it after receiving notice that it is to be used to discharge a deficiency following the beneficiary-lender's *nonjudicial* foreclosure on real property. Such a use of standby letters of credit constitutes a 'defect not apparent on the face of the documents' within the meaning of California Uniform Commercial Code section 5114, subdivision (2)(b), and therefore such permissive dishonor does no offense to the ' independence principle.' " (Original italics, fn. omitted.)

In that first opinion, the Court of Appeal also solicited the Legislature's attention: "To the extent

that this result will present problems for real estate lenders with respect to the way they now do business (as the Bank and several amici curiae have strongly suggested), it is a matter which should be addressed to the Legislature. We have been presented with two important but conflicting statutory policies. Our reconciliation of them in this case may not prove as satisfactory in another factual context. It is therefore a matter which should receive early legislative attention." (Fn. omitted.)

We granted review, and while the matter was pending, the Legislature passed Senate Bill No. 1612, an urgency statute that the Governor signed on ***242** September 15, 1994. Senate Bill No. 1612 affected four statutes. Section 1 of the bill amended Civil Code section 2787 to state that a letter of credit is not a form of suretyship obligation. (Stats. 1994, ch. 611, § 1.) Section 2 of the bill added Code of Civil Procedure section 580.5, explicitly excluding letters of credit from the purview of the antideficiency laws. (Stats. 1994, ch. 611, § 2.) Section 3 of the bill added Code of Civil Procedure section 580.7, which declares unenforceable letters of credit issued to avoid defaults on purchase money mortgages for owner-occupied real property containing one to four residential units. (Stats. 1994, ch. 611, § 3.) Section 4 of the bill made "technical, nonsubstantive changes" to section 5114. (Stats. 1994, ch. 611, § 4; Legis. Counsel's Dig., Sen. Bill No. 1612 (1993-1994 Reg. Sess.).)

The Legislature made its purpose explicit: "It is the intent of the Legislature in enacting Sections 2 and 4 of this act to confirm the independent nature of the letter of credit engagement and to abrogate the holding [of the Court of Appeal in this case] .... [¶] The Legislature also intends to confirm the expectation of the parties to a contract that underlies a letter of credit, that the beneficiary will have available the value of the real estate collateral and the benefit of the letter of credit without regard to the order in which the beneficiary may resort to either." (Stats. 1994, ch. 611, § 5.) The same purpose was echoed in the bill's statement of the facts calling for an urgency statute: "In order to confirm and clarify the law applicable to obligations which are secured by real property or an estate for years therein and which also are supported by a letter of credit, it is necessary that this act take effect immediately." (Stats. 1994, ch. 611, § 6.)

After the Legislature enacted Senate Bill No. 1612, we requested the parties' views on its effect. On February 2, 1995, after considering the parties' responses, we transferred the case to the Court of Appeal with directions to vacate its decision and reconsider the cause in light of the Legislature's action.

On reconsideration, the Court of Appeal determined Senate Bill No. 1612 constituted a substantial change in existing law. Believing there was no clear evidence that the Legislature intended the statute to operate retrospectively, the Court of Appeal thought Senate Bill No. 1612 had only prospective application. Therefore, Senate Bill No. 1612 did not affect the Court of Appeal's prior conclusions on the parties' rights and obligations. The Court of Appeal filed its second opinion on September 29, 1995, mostly repeating its prior reasoning and conclusions. We granted the Bank's petition for review.

II. Discussion

(1a) As the Court of Appeal recognized, we first must determine the effect on this case of the Legislature's enactment of Senate Bill No. 1612. ***243** (2) A basic canon of statutory interpretation is that statutes do not operate retrospectively unless the Legislature plainly intended them to do so. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207-1208 [246 Cal.Rptr. 629, 753 P.2d 585]; *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 393 [182 P.2d 159].) A statute has retrospective effect when it substantially changes the legal consequences of past events. (*Kizer v. Hanna* (1989) 48 Cal.3d 1, 7 [255 Cal.Rptr. 412, 767 P.2d 679].) A statute does not operate retrospectively simply because its application depends on facts or conditions existing before its enactment. (*Ibid.*) Of course, when the Legislature clearly intends a statute to operate retrospectively, we are obliged to carry out that intent unless due process considerations prevent us. (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587, 592 [128 Cal.Rptr. 427, 546 P.2d 1371].)

(3) A corollary to these rules is that a statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment. We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. (Cf. *Williams v. Garcetti* (1993) 5 Cal.4th 561, 568 [20 Cal.Rptr.2d 341, 853 P.2d 507].) Our consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning. (*Martin v. California Mut. B.*

& L. Assn. (1941) 18 Cal.2d 478, 484 [116 P.2d 71]; *GTE Sprint Communications Corp. v. State Bd. of Equalization* (1991) 1 Cal.App.4th 827, 833 [2 Cal.Rptr.2d 441]; see *Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 828, fn. 8 [114 Cal.Rptr. 589, 523 P.2d 629].) Such a legislative act has no retrospective effect because the true meaning of the statute remains the same. (*Stockton Sav. & Loan Bank v. Massanet* (1941) 18 Cal.2d 200, 204 [114 P.2d 592]; *In re Marriage of Reuling* (1994) 23 Cal.App.4th 1428, 1440 [28 Cal.Rptr.2d 726]; *Tyler v. State of California* (1982) 134 Cal.App.3d 973, 976-977 [185 Cal.Rptr. 49].)

One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation: " 'An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute.... [¶] If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act-a formal change-rebutting the presumption of substantial change.' (1A Singer, Sutherland Statutory Construction (5th ed. 1993) § 22.31, p. ***244** 279, fns. omitted.)" (*RN Review for Nurses, Inc. v. State of California* (1994) 23 Cal.App.4th 120, 125 [28 Cal.Rptr.2d 354].) [FN4]

> FN4 The " 'presumption of substantial change' " mentioned in the quoted passage refers to the presumption that amendatory legislation accomplishing substantial change is intended to have only prospective effect. Some courts have thought changes categorized as merely formal or procedural present no problem of retrospective operation. However, as mentioned above, California has rejected this type of classification: "In truth, the distinction relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears." (*Aetna Cas. & Surety Co. v. Ind. Acc. Com., supra*, 30 Cal.2d at p. 394; cf. *Kizer v. Hanna, supra*, 48 Cal.3d at pp. 7-8.)

Even so, a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts. (*California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 213 [187 P.2d 702]; *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326 [109 P.2d 935]; see *Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893, fn. 8 [185 Cal.Rptr. 582].) Indeed, there is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature's enactment when a gulf of decades separates the two bodies. (Cf. *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 51-52 [276 Cal.Rptr. 114, 801 P.2d 357].) Nevertheless, the Legislature's expressed views on the prior import of its statutes are entitled to due consideration, and we cannot disregard them.

(4) "[A] subsequent expression of the Legislature as to the intent of the prior statute, although not binding on the court, may properly be used in determining the effect of a prior act." (*California Emp. etc. Com. v. Payne, supra*, 31 Cal.2d at pp. 213-214.) Moreover, even if the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a "clarification," the declaration of intent may still effectively reflect the Legislature's purpose to achieve a retrospective change. (*Id.* at p. 214.) Whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question for the legislative body enacting the statute. (*Evangelatos v. Superior Court, supra*, 44 Cal.3d at p. 1206.) Thus, where a statute provides that it clarifies or declares existing law, "[i]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, we must give effect to this intention unless there is some constitutional objection thereto." (*California Emp. etc. Com. v. Payne, supra*, 31 Cal.2d at ***245**p. 214; cf. *City of Sacramento v. Public Employees' Retirement System* (1994) 22 Cal.App.4th 786, 798 [27 Cal.Rptr.2d 545]; *City of Redlands v. Sorensen* (1985) 176 Cal.App.3d 202, 211 [221 Cal.Rptr. 728].)

With respect to Senate Bill No. 1612, the Legislature made its intent plain. Section 5 of the bill states, in part: "It is the intent of the Legislature in enacting Sections 2 and 4 of this act [FN5] to confirm the independent nature of the letter of credit engagement and to abrogate the holding in [the Court of Appeal's earlier opinion in this case], that presentment of a draft under a letter of credit issued in connection with a real property secured loan following foreclosure violates Section 580d of the Code of Civil Procedure and constitutes a 'fraud ... or other defect not apparent on the face of the documents' under paragraph (b) of subdivision (2) of Section 5114 of the Commercial Code.... [¶] The Legislature also intends to confirm the expectation of the parties to a contract that underlies a letter of credit, that the beneficiary will have available the value of the real estate collateral and the benefit of the letter of credit without regard to the order in which the beneficiary may resort to either." (Stats. 1994, ch. 611, § 5.)

FN5 Section 2 of Senate Bill No. 1612 added Code of Civil Procedure section 580.5, which provides in pertinent part: "(b) With respect to an obligation which is secured by a mortgage or a deed of trust upon real property or an estate for years therein and which is also supported by a letter of credit, neither the presentment, receipt of payment, or enforcement of a draft or demand for payment under the letter of credit by the beneficiary of the letter of credit nor the honor or payment of, or the demand for reimbursement, receipt of reimbursement or enforcement of any contractual, statutory or other reimbursement obligation relating to, the letter of credit by the issuer of the letter of credit shall, whether done before or after the judicial or nonjudicial foreclosure of the mortgage or deed of trust or conveyance in lieu thereof, constitute any of the following: [¶] (1) An action within the meaning of subdivision (a) of Section 726, or a failure to comply with any other statutory or judicial requirement to proceed first against security. [¶] (2) A money judgment for a deficiency or a deficiency judgment within the meaning of Section 580a, 580b, or 580d, or subdivision (b) of Section 726, or the functional equivalent of any such judgment. [¶] (3) A violation of Section 580a, 580b, 580d, or 726." (Code Civ. Proc., § 580.5, subd. (b), as added by Stats. 1994, ch. 611, § 2.)
Section 4 of Senate Bill No. 1612 made certain technical, nonsubstantive changes to section 5114, which embodies the independence principle applicable to letter of credit payment obligations. (§ 5114, as amended by Stats. 1994, ch. 611, § 4.)

The Legislature's intent also was evident in its statement of the facts justifying enactment of Senate Bill No. 1612 as an urgency statute: "In order to confirm and clarify the law applicable to obligations which are secured by real property or an estate for years therein and which also are supported by a letter of credit, it is necessary that this act take effect immediately." (Stats. 1994, ch. 611, § 6.) The Legislature's unmistakable focus was the disruptive effect of the Court of Appeal's decision on the expectations of parties to transactions where a letter of credit was issued in connection with a loan secured by real property. By abrogating the Court of Appeal's decision, the ***246** Legislature intended to protect those parties' expectations and restore certainty and stability to those transactions. If the Legislature acts promptly to correct a perceived problem with a judicial construction of a statute, the courts generally give the Legislature's action its intended effect. (See, e.g., *Escalante v. City of Hermosa Beach* (1987) 195 Cal.App.3d 1009, 1020 [241 Cal.Rptr. 199]; *City of Redlands v. Sorensen*, *supra*, 176 Cal.App.3d at pp. 211-212; *Tyler v. State of California*, *supra*, 134 Cal.App.3d at pp. 976-977; but see *Del Costello v. State of California*, *supra*, 135 Cal.App.3d at p. 893, fn. 8 [courts need not accept Legislature's interpretation of statute].) The plain import of Senate Bill No. 1612 is that the Legislature intended its provisions to apply immediately to existing loan transactions secured by real property and supported by outstanding letters of credit, including those in this case.

We next consider whether Senate Bill No. 1612 effected a change in the law, or instead represented a clarification of the state of the law before the Court of Appeal's decision. As mentioned earlier, Senate Bill No. 1612 amended two code sections (§ 5114; Civ. Code, § 2787) and added two sections to the Code of Civil Procedure (§ § 580.5, 580.7). The two code sections Senate Bill No. 1612 amended plainly made no substantive change in the law. The amendments to section 5114, which concerns the issuer's duty to honor a draft conforming to the letter of credit's terms, were "technical, nonsubstantive changes," as the Legislative Counsel's Digest

correctly noted. (See Legis. Counsel's Dig., Sen. Bill No. 1612 (1993-1994 Reg. Sess.).)

In the other section amended, Civil Code section 2787, Senate Bill No. 1612 added a statement reflecting an established formal distinction: "A letter of credit is not a form of suretyship obligation." (Stats. 1994, ch. 611, § 1.) Civil Code section 2787 defines a surety or guarantor as "one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor." Generally, a surety's liability for an obligation is secondary to, and derivative of, the liability of the principal for that obligation. (See, e.g., Civ. Code, § 2806 et seq.)

(5) By contrast, the liability of the issuer of a letter of credit to the letter's beneficiary is direct and independent of the underlying transaction between the beneficiary and the issuer's customer. (See *San Diego Gas & Electric Co. v. Bank Leumi, supra*, 42 Cal.App.4th at pp. 933-934; *Paramount Export Co. v. Asia Trust Bank, Ltd.* (1987) 193 Cal.App.3d 1474, 1480 [238 Cal.Rptr. 920]; *Lumbermans Acceptance Co. v. Security Pacific Nat. Bank* (1978) 86 Cal.App.3d 175, 178 [150 Cal.Rptr. 69].) Thus, as the amendment to Civil Code section 2787 made clear, existing law viewed a ***247** letter of credit as an independent obligation of the issuing bank rather than as a form of guaranty or a surety obligation. (See, e.g., Dolan, The Law of Letters of Credit: Commercial and Standby Credits (rev. ed. 1996) § 2.10[1], pp. 2-61 to 2-63 (Dolan, Letters of Credit); 3 White & Summers, Uniform Commercial Code (4th ed. 1995) Letters of Credit, § 26-2, pp. 112-117.) The issuer of a letter of credit cannot refuse to pay based on extraneous defenses that might have been available to its customer. (*San Diego Gas & Electric Co. v. Bank Leumi, supra*, 42 Cal.App.4th at p. 934.) Absent fraud, the issuer must pay upon proper presentment regardless of any defenses the customer may have against the beneficiary based in the underlying transaction. (*Ibid.*)

Senate Bill No. 1612's remaining statutory addition with which we are concerned, [FN6] Code of Civil Procedure section 580.5, specified that letter of credit transactions do not violate the antideficiency laws contained in Code of Civil Procedure sections 580a, 580b, 580d, or 726. (Code Civ. Proc., § 580.5, subd. (b)(3).) In particular, the new section specifies that a lender's resort to a letter of credit, and the issuer's concomitant right to reimbursement, do not constitute an "action" under Code of Civil Procedure section 726, or a failure to proceed first against security, regardless of whether they come before or after a foreclosure. (Code Civ. Proc., § 580.5, subd. (b)(1).) Similarly, letter of credit draws and reimbursements do not constitute deficiency judgments "or the functional equivalent of any such judgment." (Code Civ. Proc., § 580.5, subd. (b)(2).)

FN6 We do not address the effect of section 3 of Senate Bill No. 1612, which added section 580.7 to the Code of Civil Procedure. This section provides, in pertinent part: "(b) No letter of credit shall be enforceable by any party thereto in a loan transaction in which all of the following circumstances exist: [¶] (1) The customer is a natural person. [¶] (2) The letter of credit is issued to the beneficiary to avoid a default of the existing loan. [¶] (3) The existing loan is secured by a purchase money deed of trust or purchase money mortgage on real property containing one to four residential units, at least one of which is owned and occupied, or was intended at the time the existing loan was made, to be occupied by the customer. [¶] (4) *The letter of credit is issued after the effective date of this section.*" (Code Civ. Proc., § 580.7, subd. (b), italics added, as added by Stats. 1994, ch. 611, § 3.) The italicized language, not found in the other statutory changes made by Senate Bill No. 1612, suggests the Legislature intended section 580.7 to have prospective effect only. However, this case does not involve any interpretation of this section or its effect, and so we express no view on those matters.

The Court of Appeal saw Code of Civil Procedure section 580.5 as a change in the law, in large part, because of the analogy it employed to examine the use of standby letters of credit as additional support for loans also secured by real property. The Bank argued a standby letter of credit was the functional equivalent of cash collateral. The Court of Appeal disagreed, instead analogizing standby letters of credit to guaranties and emphasizing the similarities of purpose and function: "No matter how it may be regarded ***248** by the beneficiary, a standby letter is certainly not cash or its equivalent from the perspective of the debtor; in reality, it represents his promise to provide *additional funds* in the event of his *future* default or deficiency, thus confirming its use not as a means of payment but rather as an

instrument of guarantee." (Original italics.) The Court of Appeal relied on *Union Bank v. Gradsky* (1968) 265 Cal.App.2d 40 [71 Cal.Rptr. 64] (*Gradsky*) and *Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508 [259 Cal.Rptr. 425] (*Commonwealth Mortgage*).

Gradsky held that a creditor, after nonjudicial foreclosure of the real property security for a note, could not recover the note's unpaid balance from a guarantor. (*Gradsky, supra,* 265 Cal.App.2d at p. 41.) Significantly, the court did not find Code of Civil Procedure section 580d's prohibition of deficiency judgments barred the creditor's claim on the guarantor: "It is barred by applying the principles of estoppel. The estoppel is raised as a matter of law to prevent the creditor from recovering from the guarantor after the creditor has exercised an election of remedies which destroys the guarantor's subrogation rights against the principal debtor." (*Gradsky, supra,* 265 Cal.App.2d at p. 41.)

The court noted that the guarantor, after payment, ordinarily would be equitably subrogated to the rights and security formerly held by the creditor. (*Gradsky, supra,* 265 Cal.App.2d at pp. 44-45; cf. Civ. Code, § § 2848, 2849.) However, where the creditor first resorts to nonjudicial foreclosure, the guarantor could not acquire any subrogation rights from the creditor because under Code of Civil Procedure section 580d, the nonjudicial sale eliminated both the security and the possibility of a deficiency judgment against the debtor. (*Gradsky, supra,* 265 Cal.App.2d at p. 45.) Because the creditor has a duty not to impair the guarantor's remedies against the debtor, the court held the creditor is estopped from pursuing the guarantor after electing a remedy-nonjudicial foreclosure-that eliminated the security for the debt and curtailed the possibility of the guarantor's reimbursement from the debtor. (*Id.* at pp. 46-47.)

However, the rules applicable to surety relationships do not govern the relationships between the parties to a letter of credit transaction. (See Dolan, Letters of Credit, *supra*, § 2.10[1], pp. 2-62 to 2-63.) At the time of this case's transactions, a majority of courts did not grant subrogation rights to an issuer that honored a draw on a credit; the issuer satisfied its own primary obligation, not the debt of another. (*Tudor Dev. Group, Inc. v. U.S. Fid. & Guar. Co.* (3d Cir. 1992) 968 F.2d 357, 361-363; see 3 White & Summers, Uniform Commercial Code, *supra*, Letters of Credit, § 26-15, pp. 211- 212; but see Cal. U. Com. Code, § 5117; fn. 2, *ante*, at pp. 237-238.) Nor does the ***249** beneficiary of a credit owe any obligations to the issuer; literal compliance with the letter of credit's terms for payment is all that is required. (Cf. *Paramount Export Co. v. Asia Trust Bank, Ltd., supra*, 193 Cal.App.3d at p. 1480; *Lumbermans Acceptance Co. v. Security Pacific Nat. Bank, supra*, 86 Cal.App.3d at p. 178.)

Gradsky contains additional language suggesting a much broader rule than its holding and analysis warranted. Going beyond the subrogation theory underlying its holding, the court observed: "If ... the guarantor ... can successfully assert an action in assumpsit against [the debtor] for reimbursement, the obvious result is to permit the recovery of a 'deficiency' judgment against the debtor following a nonjudicial sale of the security under a different label. It makes no difference to [the debtor's] purse whether the recovery is by the original creditor in a direct action following nonjudicial sale of the security, or whether the recovery is in an action by the guarantor for reimbursement of the same sum." (*Gradsky, supra,* 265 Cal.App.2d at pp. 45-46.) The court also said: "The Legislature clearly intended to protect the debtor from personal liability following a nonjudicial sale of the security. No liability, direct or indirect, should be imposed upon the debtor following a nonjudicial sale of the security. To permit a guarantor to recover reimbursement from the debtor would permit circumvention of the legislative purpose in enacting section 580d." (*Id.* at p. 46.) In view of the reasoning of the court's holding, these additional observations were unnecessary to the case's determination.

Commonwealth Mortgage followed *Gradsky* to hold a mortgage guaranty insurer could not enforce indemnity agreements to obtain reimbursement from the debtors for the insurer's payment to the lender after the lender's nonjudicial sale of its real property security. (*Commonwealth Mortgage, supra,* 211 Cal.App.3d at p. 517.) The court said the mortgage guaranty insurance policy served the same purpose as the guaranty in *Gradsky*, and thus *Gradsky* would bar the insurer from being reimbursed under subrogation principles. (*Commonwealth Mortgage, supra,* 211 Cal.App.3d at p. 517.) The court found the substitution of indemnity agreements for subrogation rights did not distinguish the case from *Gradsky*. Relying on the rule that a principal obligor incurs no additional liability on a note by also being a guarantor of it, the court said the agreements added nothing to the debtors' existing liability. (*Commonwealth Mortgage, supra,* 211 Cal.App.3d at

p. 517.) Thus, the court said the indemnity agreements could not be viewed as independent obligations. (*Ibid.*) Instead, the court concluded they were invalid attempts to have the debtors waive in advance the statutory prohibition against deficiency judgments. (*Ibid.*)

As did *Gradsky*, *Commonwealth Mortgage* also inveighed against subterfuges that thwart the purposes of Code of Civil Procedure section 580d. ***250** (*Commonwealth Mortgage, supra*, 211 Cal.App.3d at pp. 515, 517.) "Although section 580d applies by its specific terms only to actions for 'any deficiency upon a note secured by a deed of trust' and not to actions based upon other obligations, the proscriptions of section 580d cannot be avoided through artifice [citation] .... In determining whether a particular recovery is precluded, we must consider whether the policy behind section 580d would be violated by such a recovery. [Citation.]" (*Commonwealth Mortgage, supra*, 211 Cal.App.3d at p. 515.) Thus, as did the *Gradsky* court, the *Commonwealth Mortgage* court augmented its opinion with concepts unnecessary to its determination of the case. [FN7]

> FN7 The precedential value of such statements in *Commonwealth Mortgage* also is clouded by a factual enigma the court left unresolved. As the Court of Appeal recognized, the lender in that case purchased the real property security at the trustee's sale for a full credit bid, which ought to have satisfied the debt. (*Commonwealth Mortgage, supra*, 211 Cal.App.3d at p. 512, fn. 3.) Despite the apparent absence of any deficiency, the court deemed it unnecessary to decide whether a deficiency in fact remained before discussing the effect of Code of Civil Procedure section 580d's prohibition of deficiency judgments. (*Commonwealth Mortgage, supra*, 211 Cal.App.3d at p. 515.)

The Court of Appeal in this case extrapolated from the *Gradsky* and *Commonwealth Mortgage* precedents a rule that swept far beyond their origins in guaranty and suretyship relationships: "Not only is a *creditor* prevented from obtaining a deficiency judgment against the debtor, but no other person is permitted to obtain what would, in effect, amount to a deficiency judgment." (Original italics.) The Court of Appeal apparently concluded a transaction has such an effect if it "has the practical consequence of requiring the debtor to pay *additional money* on the debt *after* default or foreclosure." (Original italics.) "Thus, we preserve the principle, clearly established by *Gradsky* and *Commonwealth* [*Mortgage*], that a lender should not be able to utilize a device of any kind to avoid the limitations of section 580d; and we apply that principle here to standby letters of credit." However, as we have seen, neither *Gradsky* nor *Commonwealth Mortgage* established such a principle as a rule of law. Instead, their statements accentuated the courts' vigilance regarding attempted evasions of the antideficiency and foreclosure laws.

(1b) The Court of Appeal mistook standby letters of credit for such an attempt by seeing them only as a form of guaranty. The court analogized the standby letter of credit to a guaranty because of the perceived functional similarities. One consequence of that analogy was that the court applied to standby letters of credit a rule whose legal justifications originated in the subrogation rights owed to sureties. However, as discussed before, letters of credit-standby or otherwise-are not a form of suretyship, and the rights of the parties to these transactions are not governed by suretyship principles. ***251** Further, suretyship involves no counterpart to the independence principle essential to letters of credit.

While analogies can improve our understanding of how and why letters of credit are useful, analogies cannot substitute for recognizing the letters' unique qualities. The authors of one leading treatise aptly summarized the point: "In short, a letter of credit is a letter of credit. As Bishop Butler once said, ' Everything is what it is and not another thing.' " (3 White & Summers, Uniform Commercial Code, *supra*, Letters of Credit, § 26-2, p. 117, fn. omitted.)

By focusing on analogies to guaranties, the Court of Appeal also overlooked that the parties in this case specifically intended the standby letters of credit to be additional security. [FN8] The parties' stipulated facts include that the original loan agreement was secured by a letter of credit, and that "Vista caused [the subsequent letters of credit] to be issued by Western as additional collateral security ...." The Court of Appeal found the letters of credit were not security interests in personal property under California Uniform Commercial Code section 9501, subdivision (4), as the Bank had argued. However, we need not determine whether a standby letter of credit comes within the scope of division 9 of the California Uniform Commercial Code. A letter of credit is sui generis as a means of securing or

supporting performance of an obligation incurred in a separate transaction. Regardless of whether this idiosyncratic undertaking meets the qualifications for a security interest under the California Uniform Commercial Code, it nevertheless is a form of security for assuring another's performance.

> FN8 To the extent that resort to analogy is appropriate for such a singular legal creation as the standby letter of credit, its closest relative would seem to be cash collateral. As one commentator noted: "In view of the relative positions of the beneficiary, the [customer], and the issuing bank, the standby letter of credit is more analogous to a cash deposit left with the beneficiary than it is to the traditional letter of credit or to the performance bond. Because the beneficiary generates all the documents necessary to obtain payment, he has the power to appropriate the funds represented by the standby letter of credit at any time.... [¶] Even though the standby letter of credit is functionally equivalent to a cash deposit, it differs from a cash deposit because the customer does not have to part with its own funds until payment is made and it is forced to reimburse the issuing bank. Because the cash-flow burden might otherwise be prohibitive, this is a great advantage to a party who enters into a large number of transactions simultaneously. Moreover, the beneficiary is satisfied; while it does not actually possess the funds, as it would if a cash deposit were used, it is protected by the credit of a financial institution." (Comment, *The Independence Rule in Standby Letters of Credit* (1985) 52 U. Chi. L.Rev. 218, 225-226, fns. omitted; see Dolan, Letters of Credit, *supra*, § 1.06, pp. 1-24 to 1-25, for a discussion of cases illustrating use of standby credits in lieu of cash, bonds, and other security.)

When viewed as additional security for a note also secured by real property, a standby letter of credit does not conflict with the statutory ***252** prohibition of deficiency judgments. Code of Civil Procedure section 580d does not limit the security for notes given for the purchase of real property only to trust deeds; other security may be given as well. (*Freedland v. Greco* (1955) 45 Cal.2d 462, 466 [289 P.2d 463].) Creditors may resort to such other security in addition to nonjudicial foreclosure of the real property security. (*Ibid.*; *Hatch v. Security-First Nat. Bank* (1942) 19 Cal.2d 254, 260 [120 P.2d 869].) (6) A standby letter of credit is a security device created at the request of the customer/debtor that is an obligation owed independently by the issuing bank to the beneficiary/creditor. (See *San Diego Gas & Electric Co. v. Bank Leumi*, *supra*, 42 Cal.App.4th at pp. 933-934; *Lumbermans Acceptance Co. v. Security Pacific Nat. Bank*, *supra*, 86 Cal.App.3d at p. 178.) A creditor that draws on a letter of credit does no more than call on all the security pledged for the debt. When it does so, it does not violate the prohibition of deficiency judgments.

(1c) The Legislature plainly intended that the sections of Senate Bill No. 1612 we have addressed would apply to existing loan transactions supported by outstanding letters of credit. We conclude the Legislature's action did not effect a change in the law. Before the Legislature passed Senate Bill No. 1612, an issuer could not refuse to honor a conforming draw on a standby letter of credit-given as additional security for a real property loan-on the basis that the draw followed a nonjudicial sale of the real property security. The Court of Appeal created such a basis, but produced an unprecedented rule without solid legal underpinnings or any real connection to the actual language of the statutes involved.

Therefore, the aspects of Senate Bill No. 1612 we have discussed did not effect any change in the law, but simply clarified and confirmed the state of the law prior to the Court of Appeal's first opinion. Because the legislative action did not change the legal effect of past actions, Senate Bill No. 1612 does not act retrospectively; it governs this case. The Legislature concluded that Senate Bill No. 1612 should be given immediate effect to confirm and clarify the law applicable to loans secured by real property and supported by letters of credit. This conclusion was reasonable, particularly in view of the uncertainties the financial community evidently faced after the Court of Appeal's decision. (See, e.g., Murray, What *Should I Do With This Letter of Credit?* (Cont.Ed.Bar 1994) 17 Real Prop. L. Rptr. 133, 138-140.)

In sum, the Court of Appeal erred in concluding the Legislature's enactment of Senate Bill No. 1612 had no effect on this case. The Legislature explicitly intended to abrogate the Court of Appeal's prior decision and make certain the parties' obligations when letters of credit supported loans also secured by real property. The Legislature manifestly intended the

***253** respective obligations of the parties to a letter of credit transaction should remain unaffected by the antideficiency laws, whether those obligations arose before or after enactment of Senate Bill No. 1612. Accordingly, we conclude the judgment of the Court of Appeal should be reversed. [FN9]

> FN9 Western belatedly claims it should not be liable for prejudgment interest on the amount of the letter of credit it dishonored. It argues it should not be "punished" for seeking a declaration of its rights in a novel and complex case. The Court of Appeal decided that "if it is ultimately determined that Western is liable to the Bank on the letters of credit then it must follow that it is liable for legal interest thereon from and after the day when its obligation to pay on the letters arose. (Civ. Code, § 3287, subd. (a).)" Western did not petition for review of this aspect of the Court of Appeal decision. In any event, Western's liability for prejudgment interest is clear. The award of this interest is not imposed for the sake of punishment. The award depends only on whether Western knew or could compute the amount the Bank was entitled to recover on the letters of credit. (*Fireman's Fund Ins. Co. v. Allstate Ins. Co.* (1991) 234 Cal.App.3d 1154, 1173 [286 Cal.Rptr. 146].) The Court of Appeal correctly assessed Western's liability for prejudgment interest.

Disposition

The judgment of the Court of Appeal is reversed, and the cause remanded for further proceedings consistent with this opinion.

George, C. J., Baxter, J., and Brown, J., concurred.

WERDEGAR, J.,

Concurring and Dissenting.-I concur in the majority's conclusion that California Uniform Commercial Code section 5114, subdivision (2)(b), does not excuse Western Security Bank, N.A. (Western), the issuer, from honoring its letter of credit upon demand for payment by Beverly Hills Business Bank (the Bank), the beneficiary. I would not, however, reach this conclusion under the majority's reasoning that Senate Bill No. 1612 (Stats. 1994, ch. 611) merely declared existing law and that, prior to the bill's enactment, the antideficiency law had no effect on letters of credit. Instead, I agree with Justice Mosk that section 5114 simply does not bear the interpretation that the use of a letter of credit to support an obligation secured by a mortgage or deed of trust constitutes "fraud in the transaction." (Cal. U. Com. Code, § 5114, subd. (2); see conc. & dis. opn. of Mosk, J., *post*, at pp. 262-263.) Thus, Western was obliged to honor the Bank's demand for payment.

The conclusion that the Bank may properly draw upon the letter of credit does not compel the further conclusion that the antideficiency law ultimately offers no protection to Vista Place Asssociates. This is illustrated by a comparison of the majority opinion and the separate opinion of Justice Mosk, which agree on the former point but disagree on the latter. In my view, the Bank's petition for review of a decision rejecting its claim (as ***254** beneficiary) against Western (as issuer) under superseded law does not present an appropriate vehicle for broader pronouncements on the antideficiency law's effect on other claims and other parties. Because the Legislature in Senate Bill No. 1612 has articulated rules that will govern all future letters of credit, and because letters of credit typically expire after a finite period, the status of residual letters of credit issued before the bill's effective date will soon become an academic question. In contrast, whether the antideficiency law should as a general matter be expansively or narrowly construed remains of vital importance, as demonstrated by the interest in this case shown by amici curiae involved in the purchase and sale of real estate. Under these circumstances, the principle of judicial restraint counsels against the majority's sweeping declaration that the reach of the antideficiency law prior to Senate Bill No. 1612 was too narrow to affect the respective obligations of the parties to a letter of credit transaction.

Underlying the broad declaration just mentioned is the majority's erroneous conclusion that Senate Bill No. 1612 merely clarified existing law and, thus, may be applied to transactions entered into before the bill's operative date. Before that date, the antideficiency law did not distinguish between residential and nonresidential real estate transactions. Now, however, as amended by Senate Bill No. 1612, the antideficiency law does distinguish between residential and nonresidential real estate transactions. New Code of Civil Procedure section 580.7, which the bill added, makes a letter of credit unenforceable when issued to avoid the default of an existing loan and "[t]he existing loan is secured by a purchase money deed of trust or purchase money mortgage on

real property containing one to four residential units, at least one of which is owned and occupied, or was intended at the time the existing loan was made, to be occupied by the customer." (*Id.*, subd. (b)(3).)

In light of this provision, we may conclude that letters of credit before Senate Bill No. 1612 either were enforceable in the specified residential real estate transactions but now are not, or were not enforceable in all other real estate transactions but now are. This case does not require us to choose between these possibilities. Either way, Senate Bill No. 1612 went beyond mere clarification to change the effective scope of the antideficiency law. To apply it retroactively would change the legal consequences of past acts. Under these circumstances, it is appropriate to apply the ordinary presumption that a legislative act operates prospectively, and inappropriate to apply to this case the new set of rules articulated in Senate Bill No. 1612.

MOSK, J.,

Concurring and Dissenting.-I agree with the majority that the issue before us is not whether Senate Bill No. 1612 (1993-1994 Reg. Sess.) (hereafter Senate Bill No. 1612) has retrospective application. It does not. ***255** Rather, we must determine what the law was *before* Senate Bill No. 1612 was enacted to provide, in effect, a "standby letter of credit exception" to the antideficiency statutes.

I disagree with the majority that Senate Bill No. 1612 did not change prior law. In my view, far from merely "clarifying" the "true" meaning of prior law-as the majority implausibly assert-its numerous amendments and additions to the statutes reversed what the Court of Appeal aptly referred to as "the fifty years of consistent solicitude which California courts have given to the foreclosed purchase money mortgagee." [FN1]

> FN1 Among other things, Senate Bill No. 1612 amended Civil Code section 2787, added Code of Civil Procedure sections 580.5 and 580.7, and amended California Uniform Commercial Code former section 5114. (See Stats. 1994, ch. 611, § § 1-6.) It appears, however, that our decision in this matter will have limited application. It will operate only when: (a) a lender obtained a standby letter of credit prior to September 15, 1994, the effective date of Senate Bill No. 1612, to support a transaction secured by a deed of trust against real property; (b) the creditor defaulted on the deed of trust; (c) the lender elected to foreclose on by way of trustee's sale rather than through judicial foreclosure; and (d) the lender thereafter demanded payment under the standby letter of credit. In view of the limited precedential value of this case, a better course would have been to dismiss review as improvidently granted.

As the majority concede, a legislative declaration of an existing statute's meaning is neither binding nor conclusive. "The Legislature has no authority to interpret a statute. That is a judicial task." (*Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893, fn. 8 [185 Cal.Rptr. 582]; see also *California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 213 [187 P.2d 702]; *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326 [109 P.2d 935].) As the majority also concede, the legislative interpretation of prior law in this case is particularly unworthy of deference: Nothing in the previous legislative history of letter of credit statutes suggests an intent to create an exception to the antideficiency statutes. Indeed, it is apparently only recently that standby letters of credit have been used in real estate transactions.

Accordingly, unlike the majority, I conclude that before Senate Bill No. 1612, standby letters of credit were not exempt from the antideficiency statutes precluding creditors from obtaining a deficiency judgment from a creditor following nonjudicial foreclosure on a real property loan.

I.

As the Court of Appeal emphasized, before Senate Bill No. 1612, the potential conflict between the letters of credit statutes and the antideficiency statutes posed a question of first impression, arising from the relatively recent innovation of the use of standby letters of credit as additional security ***256** for real estate loans. Does the so-called "independence principle"- under which letters of credit stand separate and apart from the underlying transaction-constitute an exception to the antideficiency statutes that bar deficiency judgments after a nonjudicial foreclosure on real property?

The majority conclude that even before Senate Bill No. 1612, there was no restriction on the right of a creditor to demand payment on a standby letter of

credit after a nonjudicial foreclosure on real property. They are wrong.

Under the so-called "independence principle," the issuer of a standby letter of credit "must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary." (Cal. U. Com. Code, former § 5114, subd. (1), as amended by Stats. 1994, ch. 611, § 4.) In turn, the issuer of a standby letter of credit "is entitled to immediate reimbursement of any payment made under the credit and to be put in effectively available funds not later than the day before maturity of any acceptance made under the credit." (*Id.*, subd. (3).) [FN2]

> FN2 As the reference to "goods or documents" in the statute suggests, the drafters appear to have contemplated use of letters of credit in commercial financial transactions, not as additional security in real estate transactions.

A standby letter of credit specifically operates as a means of guaranteeing payment in the event of a future default. "A letter of credit is an engagement by an issuer (usually a bank) to a beneficiary, made at the request of a customer, which binds the bank to honor drafts up to the amount of the credit upon the beneficiary's compliance with certain conditions specified in the letter of credit. The customer is ultimately liable to reimburse the bank. The traditional function of the letter of credit is to finance an underlying customer's beneficiary contract for the sale of goods, directing the bank to pay the beneficiary for shipment. A different function is served by the ' standby' letter of credit, which directs the bank to pay the beneficiary not for his own performance but upon the customer's default, thereby serving as a guarantee device." (Note, "*Fraud in the Transaction": Enjoining Letters of Credit During the Iranian Revolution* (1980) 93 Harv. L.Rev. 992, 992-993, fns. omitted.)

Thus, in practical effect, a standby letter of credit constitutes a promise to provide additional funds in the event of a future default or deficiency. As such, prior to passage of Senate Bill No. 1612, it potentially came up against the restrictions of the antideficiency statutes barring a creditor from obtaining additional funds from a debtor after a nonjudicial foreclosure. Indeed, as ***257** the parties concede, nothing in the applicable statutes or legislative history prior to the amendments and additions enacted by Senate Bill No. 1612 created any specific exception to the antideficiency statutes for standby letters of credit. Nor did anything in the applicable statutes or legislative history "imply" that the antideficiency statutes must yield to the so-called "independence principle," based on public policy or otherwise.

We have previously summarized the history and purpose of the antideficiency statutes as follows.

"Prior to 1933, a mortgagee of real property was required to exhaust his security before enforcing the debt or otherwise to waive all rights to his security [citations]. However, having resorted to the security, whether by judicial sale or private nonjudicial sale, the mortgagee could obtain a deficiency judgment against the mortgagor for the difference between the amount of the indebtedness and the amount realized from the sale. As a consequence during the great depression with its dearth of money and declining property values, a mortgagee was able to purchase the subject real property at the foreclosure sale at a depressed price far below its normal fair market value and thereafter to obtain a double recovery by holding the debtor for a large deficiency. [Citations.] In order to counteract this situation, California in 1933 enacted fair market value limitations applicable to both judicial foreclosure sales ([Code Civ. Proc.,] § 726) and private foreclosure sales ([*id.*,] § 580a) which limited the mortgagee's deficiency judgment after exhaustion of the security to the difference between the fair [market] value of the property at the time of the sale (irrespective of the amount actually realized at the sale) and the outstanding debt for which the property was security. Therefore, if, due to the depressed economic conditions, the property serving as security was sold for less than the fair [market] value as determined under section 726 or section 580a, the mortgagee could not recover the amount of that difference in this action for a deficiency judgment. [Citation.]

"In certain situations, however, the Legislature deemed even this partial deficiency too oppressive. Accordingly, in 1933 it enacted section 580b [citation] which barred deficiency judgments altogether on purchase money mortgages. 'Section 580b places the risk of inadequate security on the purchase money mortgagee. A vendor is thus discouraged from overvaluing the security. Precarious land promotion schemes are discouraged,

for the security value of the land gives purchasers a clue as to its true market value. [Citation.] If inadequacy of security results, not from overvaluing, but from a decline in property values during a general or local depression, section 580b prevents the aggravation of the downturn that would result if defaulting ***258** purchasers were burdened with large personal liability. Section 580b thus serves as a stabilizing factor in land sales.' [Citations.]

"Although both judicial foreclosure sales and private nonjudicial foreclosure sales provided for identical deficiency judgments in nonpurchase money situations subsequent to the 1933 enactment of the fair value limitations, one significant difference remained, namely property sold through judicial foreclosure was subject to the statutory right of redemption ([Code Civ. Proc.,] § 725a), while property sold by private foreclosure sale was not redeemable. By virtue of sections 725a and 701, the judgment debtor, his successor in interest or a junior lienor could redeem the property at any time during one year after the sale, frequently by tendering the sale price. The effect of this right of redemption was to remove any incentive on the part of the mortgagee to enter a low bid at the sale (since the property could be redeemed for that amount) and to encourage the making of a bid approximating the fair market value of the security. However, since real property purchased at a private foreclosure sale was not subject to redemption, the mortgagee by electing this remedy, could gain irredeemable title to the property by a bid substantially below the fair value and still collect a deficiency judgment for the difference between the fair value of the security and the outstanding indebtedness.

"In 1940 the Legislature placed the two remedies, judicial foreclosure sale and private nonjudicial foreclosure sale on a parity by enacting section 580d [citation]. Section 580d bars 'any deficiency judgment' following a private foreclosure sale. 'It seems clear ... that section 580d was enacted to put judicial enforcement on a parity with private enforcement. This result could be accomplished by giving the debtor a right to redeem after a sale under the power. The right to redeem, like proscription of a deficiency judgment, has the effect of making the security satisfy a realistic share of the debt. [Citation.] By choosing instead to bar a deficiency judgment after private sale, the Legislature achieved its purpose without denying the creditor his election of remedies. If the creditor wishes a deficiency judgment, his sale is subject to statutory redemption rights. If he wishes a sale resulting in nonredeemable title, he must forego the right to a deficiency judgment. In either case his debt is protected.' " (*Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 600-602 [125 Cal.Rptr. 557, 542 P.2d 981], fns. omitted.)

Over the several decades since their enactment, our courts have construed the antideficiency statutes liberally, rejecting attempts to circumvent the proscriptions against deficiency judgments after nonjudicial foreclosure. "It is well settled that the proscriptions of section 580d cannot be avoided through artifice ...." (***259***Rettner v. Shepherd* (1991) 231 Cal.App.3d 943, 952 [282 Cal.Rptr. 687]; accord, *Freedland v. Greco* (1955) 45 Cal.2d 462, 468 [289 P.2d 463] [In construing the antideficiency statutes, " 'that construction is favored which would defeat subterfuges, expediencies, or evasions employed to continue the mischief sought to be remedied by the statute, or ... to accomplish by indirection what the statute forbids.' "]; *Simon v. Superior Court* (1992) 4 Cal.App.4th 63, 78 [5 Cal.Rptr.2d 428].)

Nor can the antideficiency protections be waived by the borrower at the time the loan was made. (See Civ. Code, § 2953 [such waiver "shall be void and of no effect"]; *Valinda Builders, Inc. v. Bissner* (1964) 230 Cal.App.2d 106, 112 [40 Cal.Rptr. 735] [The debtor's waiver agreement was "contrary to public policy, void and ineffectual for any purpose."].)

In this regard, as the Court of Appeal observed, two decisions are of particular relevance here: *Union Bank v. Gradsky* (1968) 265 Cal.App.2d 40 [71 Cal.Rptr. 64] (hereafter *Gradsky*), and *Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508 [259 Cal.Rptr. 425] (hereafter *Commonwealth*).

In *Gradsky*, the Court of Appeal held that Code of Civil Procedure section 580d operated to preclude a lender from collecting the unpaid balance of a promissory note from the guarantor after a nonjudicial foreclosure on the real property securing the debt. It concluded that if the guarantor could successfully assert an action against the borrower for reimbursement, "the obvious result is to permit the recovery of a 'deficiency' judgment against the [borrower] following a nonjudicial sale of the security under a different label." (*Gradsky, supra*, 265 Cal.App.2d at pp. 45-46.) "The Legislature clearly intended to protect the [borrower] from personal liability following a nonjudicial sale of the

security. No liability, direct or indirect, should be imposed upon the [borrower] following a nonjudicial sale of the security. To permit a guarantor to recover reimbursement from the debtor would permit circumvention of the legislative purpose in enacting section 580d." (*Id.* at p. 46.)

In *Commonwealth*, borrowers purchased real property with a loan secured by promissory notes provided by a bank. At the bank's request, they obtained policies of mortgage guarantee insurance to secure payment on the promissory notes. They also signed indemnity agreements promising to reimburse the mortgage insurer for any funds it paid out under the policy. When the borrowers defaulted on the promissory notes, the bank foreclosed nonjudicially on the real property. It then collected on the mortgage insurance; the mortgage insurer then brought an action for reimbursement on the indemnity agreements. ***260**

The Court of Appeal in *Commonwealth* held that reimbursement was barred by Code of Civil Procedure section 580d. It rejected the argument that the indemnity agreements constituted separate and independent obligations: "The instant indemnity agreements add nothing to the liability [the borrowers] already incurred as principal obligors on the notes .... To splinter the transaction and view the indemnity agreements as separate and independent obligations ... is to thwart the purpose of section 580d by a subterfuge [citation], a result we cannot permit." (*Commonwealth, supra*, 211 Cal.App.3d at p. 517.)

The majority's attempt to distinguish *Gradsky* and *Commonwealth*, by characterizing them as grounded in subrogation law, is unpersuasive. Indeed, in *Commonwealth*, subrogation law was not directly in issue; the indemnity obligation provided a contract upon which to base collection. [FN3]

> FN3 In any event, the analogy between standby letters of credit and guarantees is not as "forced" as the majority would suggest. As one commentator recently observed, "upon closer analysis, the borders between standby credits and contracts of guarantee are not so well settled as they may first appear." (McLaughlin, *Standby Letters of Credit and Guaranties: An Exercise in Cartography* (1993) 34 Wm. & Mary L.Rev. 1139, 1140; see also Alces, *An Essay on Independence, Interdependence, and the Suretyship Principle* (1993) 1993 U. Ill. L.Rev. 447 [rejecting distinction between letters of credit and "secondary obligations," i.e., guarantees and sureties].) Moreover, "courts have long recognized that, in a sense, issuers of credits 'must be regarded as sureties.' [Citation.] A seller of goods often insists on a commercial letter of credit because he is unsure of the buyer's ability to pay. The standby letter of credit arises out of situations in which the beneficiary wants to guard against the applicant's nonperformance. In both instances, the credit serves in the nature of a guaranty." Dolan, The Law of Letters of Credit: Commercial and Standby Credits (2d ed. 1991) § 2.10[1], pp. 2-61 to 2-62.)

The majority miss the point. As the Court of Appeal in this matter explained: "*Gradsky* and *Commonwealth* reflect the strong judicial concern about the efforts of secured real property lenders to circumvent section 580d by the use of financial transactions between debtors and third parties which involve post-nonjudicial foreclosure debt obligations for the borrowers. Their common and primary focus is on the lender's requirement that the debtor make arrangements with a third party to pay a portion or all of the mortgage debt remaining after a foreclosure, i.e., to pay the debtor's deficiency."

The Legislature, in enacting Senate Bill No. 1612, expressly abrogated the Court of Appeal decision in this matter and gave primacy to the so-called "independence principle" as against the antideficiency protections. Its additions and amendments to the statutes-lobbied for, and drafted by, the California Bankers Association-significantly altered prior law. Senate Bill No. 1612, therefore, should have prospective application only. ***261**

In their strained attempt to reach the conclusion that Senate Bill No. 1612 governs this case, the majority adopt the fiction that a standby letter of credit is an "idiosyncratic" form of "security" or the "functional equivalent" of cash collateral. They offer no sound support for such an approach. There is none. [FN4]

> FN4 The principal "authority" cited by the majority for the proposition that standby letters of credit are the "functional equivalent" of cash collateral is a student law review note published over a decade ago-and apparently never cited in any case in California or elsewhere. (Comment, *The*

> *Independence Rule in Standby Letters of Credit* (1985) 52 U. Chi. L.Rev. 218.) Significantly, the note nowhere discusses the use of standby letters of credit in transactions involving purchase money mortgages or the potential conflict between the so-called "independence principle" and antideficiency statutes. Indeed, it assumes that "[t]hose who engage in standby letter of credit transactions are usually large corporate or governmental entities with access to high-quality counsel and are thus in a position to evaluate and respond to the risks involved." (*Id.* at p. 238.) Needless to say, that is often *not* the case in real property transactions, particularly those involving residential property. As a leading commentator observed: "the motivation of the parties to a real estate secured transaction is frequently other than purely commercial, and their relative bargaining power is often grossly disproportionate." (Hetland & Hansen, *The "Mixed Collateral" Amendments to California's Commercial Code-Covert Repeal of California's Real Property Foreclosure and Antideficiency Provisions or Exercise in Futility?* (1987) 75 Cal.L.Rev. 185, 188, fn. omitted.)

As the Court of Appeal observed, from the perspective of the debtor, a standby letter of credit is not cash or its equivalent. It is, instead, a promise to provide additional funds *in the event of future default or deficiency* and has the practical consequence of requiring the debtor to pay *additional* money on the debt *after* default or foreclosure. [FN5] Moreover, unlike cash, which can be pledged as collateral security only once, a standby letter of credit does not require a debtor to part with its own funds until payment is made and thus permits a borrower to use standby letters of credit in a large number of transactions separately. Cash collateral, by contrast, does not impose personal liability on the borrower following a trustee's sale and does not encourage speculative lending practices.

> FN5 Although it appears to be uncommon, an issuer of a standby letter of credit may demand security from its customer in the form of cash collateral or personal property as a condition for issuing the letter of credit. In the event of a draw on the letter of credit, the issuer would then have recourse to the pledged security, up to the value of the draw, without requiring its customer to pay additional money. Whether a real estate lender's draw on a standby letter of credit backed by security, and not by a mere promise to pay, would fall within the mixed security rule is a difficult question that need not be addressed here.

As the Court of Appeal observed: "For us to conclude that such use of a standby letter of credit is the same as an increased cash investment (whether or not from borrowed funds) is to deny reality and to invite the very overvaluation and potential aggravation of an economic downturn which the antideficiency legislation was originally enacted to prevent." ***262**

II.

The Court of Appeal correctly concluded that, before Senate Bill No. 1612, there was no implied exception to the antideficiency statutes for letters of credit. It erred, however, in holding that Western Security Bank, N.A. (Western) could have refused to honor the letter of credit on the ground that the Beverly Hills Business Bank (Bank), in presenting the letters of credit after a nonjudicial foreclosure, worked an "implied" fraud on Vista Place Associates (Vista).

The Court of Appeal cited former California Uniform Commercial Code former section 5114, subdivision (2)(b), which provides that when there has been a notification from the customer of "fraud, forgery or other defect not apparent on the face of the documents," the issuer "may"-but is not obligated to-"honor the draft or demand for payment."(Cal. U. Com. Code, § 5114, subd. (2)(b) as amended by Stats. 1994, ch. 611, § 4.) [FN6] The statute is inapplicable under the present facts.

> FN6 An issuer's obligations and rights are now governed by California Uniform Commercial Code section 5108, enacted in 1996 as part of Senate Bill No. 1599. (Stats. 1996, ch. 176, § 7.) The same legislation repealed section 5114, relating to the issuer's duty to honor a draft or demand for payment, as part of the repeal of division 5, Letters of Credit. (Stats. 1996, ch. 176, § 6.)

Western, presented with a demand for payment on a letter of credit, was limited to determining whether the documents presented by the beneficiary complied with the letter of credit-a purely ministerial task of comparing the documents presented against the

description of the documents in the letter of credit. If the documents comply on their face, the issuer must honor the draw, regardless of disputes concerning the underlying transaction. (*Lumbermans Acceptance Co. v. Security Pacific Nat. Bank* (1978) 86 Cal.App.3d 175, 178 [150 Cal.Rptr. 69]; Cal. U. Com. Code, former § 5109, subd. (2) as added by Stats. 1963, ch. 819, § 1, p. 1934.) Thus, in this case, Western was not entitled to look beyond the documents presented by the Bank and refuse to honor the standby letter of credit based on a potential violation of the antideficiency statutes in the underlying transaction.

In my view, the concurring and dissenting opinion by Justice Kitching in the Court of Appeal correctly reconciled the policies behind standby letter of credit law and the antideficiency provisions of Code of Civil Procedure section 580d, as they existed *before* Senate Bill No. 1612. Thus, I would conclude that Western was obligated, under the so-called "independence principle," to honor the standby letter of credit presented by the Bank. None of the limited exceptions to that rule applied. Western was not, however, without recourse. It was entitled to seek reimbursement from Vista, pursuant ***263** to former California Uniform Commercial Code former section 5114, subdivision (3) and its promissory notes. Vista, in turn, could seek disgorgement from the Bank, if it has not legally waived its protection under Code of Civil Procedure section 580d-an issue that is not before us and should be remanded to the trial court. As Justice Kitching's concurrence and dissent concluded, "[t]his procedure would retain certainty in the California letter of credit market while implementing the policies supporting section 580d."

Kennard, J., concurred. ***264**

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Western Sec. Bank, N.A. v. Superior Court (Beverly Hills Business Bank)

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24 Cal.2d 753
24 Cal.2d 753, 151 P.2d 233, 155 A.L.R. 405
(Cite as: 24 Cal.2d 753)

WHITCOMB HOTEL, INC. (a Corporation) et al., Petitioners,
v.
CALIFORNIA EMPLOYMENT COMMISSION et al., Respondents; FERNANDO R. NIDOY et al., Interveners and Respondents.
S. F. No. 16854.

Supreme Court of California

Aug. 18, 1944.

HEADNOTES

(1) Statutes § 180(2)--Construction--Executive or Departmental Construction.
The construction of a statute by the officials charged with its administration must be given great weight, for their substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in drafting the statute.

See 23 **Cal.Jur.** 776; 15 **Am.Jur.** 309.

(2) Statutes § 180(2)--Construction--Executive or Departmental Construction.
An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment.

(3) Statutes § 180(2)--Construction--Executive or Departmental Construction.
An erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change.

(4) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
The disqualification imposed on a claimant by Unemployment Insurance Act, § 56(b) (Stats. 1935, ch. 352, as amended; Deering's Gen. Laws, 1937, Act 8780d), for refusing without good cause to accept suitable employment when offered to him, or failing to apply for such employment when notified by the district public employment office, is an absolute disqualification that necessarily extends throughout the period of his unemployment entailed by his refusal to accept suitable employment, and is terminated only by his subsequent employment.

See 11 **Cal.Jur. Ten-year Supp.** (Pocket Part) "Unemployment Reserves and Social Security."

(5) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
One who refuses suitable employment without good cause is not involuntarily unemployed through no fault of his own. He has no claim to benefits either at the time of his refusal or at any subsequent time until he again brings himself within the Unemployment Insurance Act. ***754**

(6) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
Employment Commission Rule 56.1, which attempts to create a limitation as to the time a person may be disqualified for refusing to accept suitable employment, conflicts with Unemployment Insurance Act, § 56(b), and is void.

(7) Unemployment Relief--Powers of Employment Commission--Adoption of Rules.
The power given the Employment Commission by the Unemployment Insurance Act, § 90, to adopt rules and regulations is not a grant of legislative power, and in promulgating such rules the commission may not alter or amend the statute or enlarge or impair its scope.

(8) Unemployment Relief--Remedies of Employer--Mandamus.
Inasmuch as the Unemployment Insurance Act, § 67, provides that in certain cases payment of benefits shall be made irrespective of a subsequent appeal, the fact that such payment has been made does not deprive an employer of the issuance of a writ of mandamus to compel the vacation of an award of benefits when he is entitled to such relief.

SUMMARY

PROCEEDING in mandamus to compel the California Employment Commission to vacate an award of unemployment benefits and to refrain from charging petitioners' accounts with benefits paid. Writ granted.

COUNSEL

Brobeck, Phleger & Harrison, Gregory A. Harrison and Richard Ernst for Petitioners.

Robert W. Kenny, Attorney General, John J. Dailey, Deputy Attorney General, Forrest M. Hill, Gladstein, Grossman, Margolis & Sawyer, Ben Margolis, William Murrish, Gladstein, Grossman, Sawyer & Edises, Aubrey Grossman and Richard Gladstein for Respondents.

Clarence E. Todd and Charles P. Scully as Amici Curiae on behalf of Respondents.

TRAYNOR, J.

In this proceeding the operators of the Whitcomb Hotel and of the St. Francis Hotel in San Francisco seek a writ of mandamus to compel the California Employment Commission to set aside its order granting unemployment insurance benefits to two of their former employees, Fernando R. Nidoy and Betty Anderson, corespondents in this action, and to restrain the commission from charging petitioners' accounts with benefits paid pursuant to ***755** that order. Nidoy had been employed as a dishwasher at the Whitcomb Hotel, and Betty Anderson as a maid at the St. Francis Hotel. Both lost their employment but were subsequently offered reemployment in their usual occupations at the Whitcomb Hotel. These offers were made through the district public employment office and were in keeping with a policy adopted by the members of the Hotel Employers' Association of San Francisco, to which this hotel belonged, of offering available work to any former employees who recently lost their work in the member hotels. The object of this policy was to stabilize employment, improve working conditions, and minimize the members' unemployment insurance contributions. Both claimants refused to accept the proffered employment, whereupon the claims deputy of the commission ruled that they were disqualified for benefits under section 56(b) of the California Unemployment Insurance Act (Stats. 1935, ch. 352, as amended; Deering's Gen. Laws, 1937, Act 8780d), on the ground that they had refused to accept offers of suitable employment, but limited their disqualification to four weeks in accord with the commission's Rule 56.1. These decisions were affirmed by the Appeals Bureau of the commission. The commission, however, reversed the rulings and awarded claimants benefits for the full period of unemployment on the ground that under the collective bargaining contract in effect between the hotels and the unions, offers of employment could be made only through the union.

In its return to the writ, the commission concedes that it misinterpreted the collective bargaining contract, that the agreement did not require all offers of employment to be made through the union, and that the claimants are therefore subject to disqualification for refusing an offer of suitable employment without good cause. It alleges, however, that the maximum penalty for such refusal under the provisions of Rule 56.1, then in effect, was a four-week disqualification, and contends that it has on its own motion removed all charges against the employers for such period.

The sole issue on the merits of the case involves the validity of Rule 56.1, which limits to a specific period the disqualification imposed by section 56(b) of the act. Section 56 of the act, under which the claimants herein were admittedly disqualified, ***756** provides that: "An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him under any of the following conditions: ... (b) If without good cause he has refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by the District Public Employment Office." Rule 56.1, as adopted by the commission and in effect at the time here in question, restated the statute and in addition provided that: "In pursuance of its authority to promulgate rules and regulations for the administration of the Act, the Commission hereby provides that an individual shall be disqualified from receiving benefits if it finds that he has failed or refused, without good cause, either to apply for available, suitable work when so directed by a public employment office of the Department of Employment or to accept suitable work when offered by any employing unit or by any public employment office of said Department. Such disqualification shall continue for the week in which such failure or refusal occurred, and for not more than three weeks which immediately follow such week as determined by the Commission according to the circumstances in each case." The validity of this rule depends upon whether the commission was empowered to adopt it, and if so, whether the rule is reasonable.

The commission contends that in adopting Rule 56.1 it exercised the power given it by section 90 of the act to adopt "rules and regulations which to it seem necessary and suitable to carry out the provisions of this act" (2 Deering's Gen. Laws, 1937, Act 8780d, § 90(a)). In its view section 56(b) is ambiguous because it fails to specify a definite period of disqualification. The commission contends that a

fixed period is essential to proper administration of the act and that its construction of the section should be given great weight by the court. It contends that in any event its interpretation of the act as embodied in Rule 56.1 received the approval of the Legislature in 1939 by the reenactment of section 56(b) without change after Rule 56.1 was already in effect.

(1) The construction of a statute by the officials charged with its administration must be given great weight, for their "substantially contemporaneous expressions of opinion are ***757** highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute." (*White v. Winchester Country Club*, 315 U.S. 32, 41 [62 S.Ct. 425, 86 L.Ed. 619]; *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378 [51 S.Ct. 144, 75 L.Ed. 397]; *Riley v. Thompson*, 193 Cal. 773, 778 [227 P. 772]; *County of Los Angeles v. Frisbie*, 19 Cal.2d 634, 643 [122 P.2d 526]; *County of Los Angeles v. Superior Court*, 17 Cal.2d 707, 712 [112 P.2d 10]; see, Griswold, *A Summary of the Regulations Problem*, 54 Harv.L.Rev. 398, 405; 27 Cal.L.Rev. 578; 23 Cal.Jur. 776.) When an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation. (*Helvering v. Griffiths*, 318 U.S. 371, 403 [63 S.Ct. 636, 87 L.Ed. 843]; *United States v. Hill*, 120 U.S. 169, 182 [7 S.Ct. 510, 30 L.Ed. 627]; see *County of Los Angeles v. Superior Court*, 17 Cal.2d 707, 712 [112 P.2d 10]; *Hoyt v. Board of Civil Service Commissioners*, 21 Cal.2d 399, 402 [132 P.2d 804].) Whatever the force of administrative construction, however, final responsibility for the interpretation of the law rests with the courts. "At most administrative practice is a weight in the scale, to be considered but not to be inevitably followed. ... While we are of course bound to weigh seriously such rulings, they are never conclusive." (*F. W. Woolworth Co. v. United States*, 91 F.2d 973, 976.) (2) An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment. (*California Drive-In Restaurant Assn. v. Clark*, 22 Cal.2d 287, 294 [140 P.2d 657, 147 A.L.R. 1028]; *Bodinson Mfg. Co. v. California Employment Com.*, 17 Cal.2d 321, 326 [109 P.2d 935]; *Boone v. Kingsbury*, 206 Cal. 148, 161 [273 P. 797]; *Bank of Italy v. Johnson*, 200 Cal. 1, 21 [251 P. 784]; *Hodge v. McCall*, 185 Cal. 330, 334 [197 P. 86]; *Manhattan General Equipment Co. v. Commissioner of Int. Rev.*, 297 U.S. 129 [56 S.Ct. 397, 80 L.Ed. 528]; *Montgomery v. Board of Administration*, 34 Cal.App.2d 514, 521 [93 P.2d 1046, 94 A.L.R. 610].) (3) Moreover, an erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted ***758** without change. (*Biddle v. Commissioner of Internal Revenue*, 302 U.S. 573, 582 [58 S.Ct. 379, 82 L.Ed. 431]; *Houghton v. Payne*, 194 U.S. 88 [24 S.Ct. 590, 48 L.Ed. 888]; *Iselin v. United States*, 270 U.S. 245, 251 [46 S.Ct. 248, 70 L.Ed. 566]; *Louisville & N. R. Co. v. United States*, 282 U.S. 740, 757 [51 S.Ct. 297, 75 L.Ed. 672]; *F. W. Woolworth Co. v. United States*, 91 F.2d 973, 976; *Pacific Greyhound Lines v. Johnson*, 54 Cal.App.2d 297, 303 [129 P.2d 32]; see *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100 [60 S.Ct. 18, 84 L.Ed. 101]; *Helvering v. Hallock*, 309 U.S. 106, 119 [60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368]; *Federal Comm. Com. v. Columbia Broadcasting System*, 311 U.S. 132, 137 [61 S.Ct. 152, 85 L.Ed. 87]; Feller, *Addendum to the Regulations Problem*, 54 Harv.L.Rev. 1311, and articles there cited.)

In the present case Rule 56.1 was first adopted by the commission in 1938. It was amended twice to make minor changes in language, and again in 1942 to extend the maximum period of disqualification to six weeks. The commission's construction of section 56(b) has thus been neither uniform nor of long standing. Moreover, the section is not ambiguous, nor does it fail to indicate the extent of the disqualification. (4) The disqualification imposed upon a claimant who without good cause "has refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by the district public employment office" is an absolute disqualification that necessarily extends throughout the period of his unemployment entailed by his refusal to accept suitable employment, and is terminated only by his subsequent employment. (Accord: 5 C.C.H. Unemployment Insurance Service 35,100, par. 1965.04 [N.Y.App.Bd.Dec. 830-39, 5/27/39].) The Unemployment Insurance Act was expressly intended to establish a system of unemployment insurance to provide benefits for "persons unemployed through no fault of their own, and to reduce involuntary unemployment. ..." (Stats. 1939, ch. 564, § 2; Deering's Gen. Laws, 1939 Supp., Act 8780d, § 1.) The public policy of the State as thus declared by the Legislature was intended as a guide to the interpretation and application of the act. (*Ibid.*) (5) One who refuses suitable employment without good cause is not involuntarily unemployed through no fault of his own. He has no claim to benefits either at the time of

his refusal or at any subsequent time until he again brings himself within ***759** the provisions of the statute. (See 1 C.C.H. Unemployment Insurance Service 869, par. 1963.) Section 56(b) in excluding absolutely from benefits those who without good cause have demonstrated an unwillingness to work at suitable employment stands out in contrast to other sections of the act that impose limited disqualifications. Thus, section 56(a) disqualifies a person who leaves his work because of a trade dispute for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed; and other sections at the time in question disqualified for a fixed number of weeks persons discharged for misconduct, persons who left their work voluntarily, and those who made wilful misstatements. (2 Deering's Gen. Laws, 1937, Act 8780(d), § § 56(a), 55, 58(e); see, also, Stats. 1939, ch. 674, § 14; Deering's Gen. Laws, 1939 Supp., Act 8780d, § 58.) Had the Legislature intended the disqualification imposed by section 56(b) to be similarly limited, it would have expressly so provided. (6) Rule 56.1, which attempts to create such a limitation by an administrative ruling, conflicts with the statute and is void. (*Hodge v. McCall, supra;* *Manhattan General Equipment Co. v. Commissioner of Int. Rev.*, 297 U.S. 129, 134 [56 S.Ct. 397, 80 L.Ed. 528]; see *Bodinson Mfg. Co. v. California Employment Com.*, 17 Cal.2d 321, 326 [109 P.2d 935].) Even if the failure to limit the disqualification were an oversight on the part of the Legislature, the commission would have no power to remedy the omission. (7) The power given it to adopt rules and regulations (§ 90) is not a grant of legislative power (see 40 Columb. L. Rev. 252; cf. Deering's Gen. Laws, 1939 Supp., Act 8780(d), § 58(b)) and in promulgating such rules it may not alter or amend the statute or enlarge or impair its scope. (*Hodge v. McCall, supra;* *Bank of Italy v. Johnson*, 200 Cal. 1, 21 [251 P. 784]; *Manhattan General Equipment Co. v. Commissioner of Int. Rev., supra;* *Koshland v. Helvering*, 298 U.S. 441 [56 S.Ct. 767, 80 L.Ed. 1268, 105 A.L.R. 756]; *Iselin v. United States, supra.*) Since the commission was without power to adopt Rule 56.1, it is unnecessary to consider whether, if given such power, the provisions of the rule were reasonable.

The commission contends, however, that petitioners are not entitled to the writ because they have failed to exhaust ***760** their administrative remedies under section 41.1. This contention was decided adversely in *Matson Terminals, Inc. v. California Employment Com., ante,* p. 695 [151 P.2d 202]. It contends further that since all the benefits herein involved have been paid, the only question is whether the charges made to the employers' accounts should be removed, and that since the employers will have the opportunity to protest these charges in other proceedings, they have an adequate remedy and there is therefore no need for the issuance of the writ in the present case. The propriety of the payment of benefits, however, is properly challenged by an employer in proceedings under section 67 and by a petition for a writ of mandamus from the determination of the commission in such proceedings. (See *Matson Terminals, Inc. v. California Employment Com., ante,* p. 695 [151 P.2d 202]; *W. R. Grace & Co. v. California Employment Com., ante,* p. 720 [151 P.2d 215].) An employer's remedy thereunder is distinct from that afforded by section 45.10 and 41.1, and the commission may not deprive him of it by the expedient of paying the benefits before the writ is obtained. (8) The statute itself provides that in certain cases payment shall be made irrespective of a subsequent appeal (§ 67) and such payment does not preclude issuance of the writ. (See *Bodinson Mfg. Co. v. California Emp. Com., supra,* at pp. 330-331; *Matson Terminals, Inc. v. California Emp. Com., supra.*)

Let a peremptory writ of mandamus issue ordering the California Employment Commission to set aside its order granting unemployment insurance benefits to the corespondents, and to refrain from charging petitioners' accounts with any benefits paid pursuant to that award.

Gibson, C. J., Shenk, J., Curtis, J., and Edmonds, J., concurred.

CARTER, J.

I concur in the conclusion reached in the majority opinion for the reason stated in my concurring opinion in *Mark Hopkins, Inc. v. California Emp. Co.,* this day filed, *ante,* p. 752 [151 P.2d 233].

Schauer, J., concurred.

Intervener's petition for a rehearing was denied September 13, 1944. Carter, J., and Schauer, J., voted for a rehearing. ***761**

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